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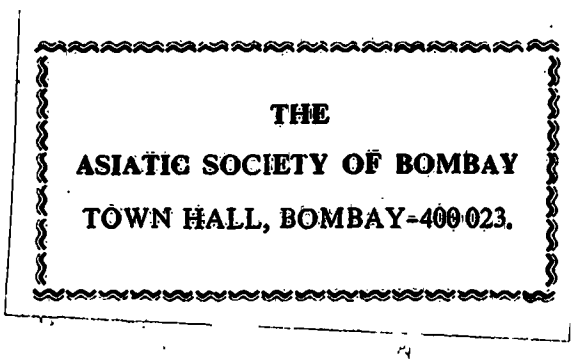

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Historical View of
the English goverament
by John Millar
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AN

HISTORICAL VIEW

OF THE

ENGLISH GOVERNMENT.

BOOK II.

OF THE ENGLISH GOVERNMENT, FROM THE REIGN OF WILLIAM THE CONQUEROR, TO THE ACCESSION OF THE HOUSE OF STEWART.

THE political history of this extensive period may be subdivided into three parts; the first extending from the Norman conquest to the end of the reign of Henry the third; the second, from the beginning of the reign of Edward the first, to the accession of Henry the seventh; and the third, comprehending the reigns of the Tudor family. In each of these parts we shall meet with progressive changes in the English constitution, which appear to demand a separate examination,

and which, being analagous to such as wer introduced, about the same time, in the other European governments, may be regarded as the natural growth and development of the original system, produced by the peculiar circumstances of modern Europe.

CHAPTER I.

The Norman Conquest.—Progress of the feudal System.—View of the several Reigns before that of Edward I.—The great Charter, and Charter of the Forest.

WILLIAM the conqueror ascended the throne of England, partly by force of arms, and partly by the voluntary submission of the people. The great landed estates, acquired by a few individuals, towards the end of the Saxon government, had exalted particular nobles to such power and splendour, as rendered them, in some degree, rivals to the sovereign, and even encouraged them, upon any favourable emergency, to aspire to the crown. Among these, under the feeble reign of Edward the confessor, we may distinguish Godwin earl of Wessex, who had become formidable to the monarch; and, after the death of that earl, his son Harold, who, at the same

time that his possessions were not less extensive than those of his father, being endowed with superior abilities, and much more amiable dispositions, appears to have attained a degree of influence and authority which no English subject had ever enjoyed. He became, of course, an object of jealousy to Edward; who, in the decline of life, and having no children, was anxious to exclude this nobleman from the throne, by securing the succession to one of his own kindred. Edward himself was properly an usurper, having seized the crown to the prejudice of his elder brother's son, the undoubted lineal heir. This prince being now dead, the right of inheritance devolved upon his son, Edgar Atheling, whose tender age, and slender abilities, appeared to disqualify him, in such a critical conjuncture, for wielding the sceptre over a fierce and turbulent people. In those disorderly times, the line of hereditary succession, though not intirely disregarded, was frequently broken from particular accidents: persons incapable of defending the sovereignty, were commonly deemed unworthy to obtain it; and the recommendation, or *will*, of the reigning prince was always

held to be a strong circumstance in favour of any future competitor for the succession.

Edward the confessor had resided four-and-twenty years in the court of Richard the second, duke of Normandy, his maternal uncle; by whom, in the short reign of his brother Edward Ironside, and during the usurpation of the Danish monarchs, he was generously educated and protected. By remaining, for so long a period, in a foreign country, where he was caressed, and treated with every mark of distinction, the English prince was led to form an attachment to the people, whose progress in arts, government, and manners, surpassed that of his own countrymen; and he ever retained a grateful remembrance of the hospitality and kindness which he had experienced in the family of his kinsman. When he mounted the throne of England, a communication was opened between the two countries; and an intimate connexion subsisted between the respective sovereigns. Multitudes of Normans resorted to the English court, in expectation of preferment; many individuals of that country obtained landed possessions in England; and many were promoted to offices of

great dignity, both in church and state. These foreigners, who stood so high in the favour of the sovereign, were imitated by the English in their dress, their amusements, their manners, and customs. They imported also the French language; which had for some time been adopted by the Normans; and which, being regarded as a more improved and elegant dialect than the Saxon, became fashionable in England, and was even employed, it is said, in the writings and pleadings of lawyers.

The duchy of Normandy having descended to William, the natural son of Robert, and nephew of Richard II. the affections, as well as the policy of Edward, made him cast his eyes upon that prince, his nearest relation by the mother, and the most able and accomplished warrior of his time, as the most proper person to succeed him in the throne. His illegitimate birth, was, in that age, an objection of little moment; since it had not prevented him from inheriting the dukedom of Normandy; and since a similar stain is observable in the line of our Saxon kings. Some historians have asserted, that the English monarch actually made a *will*, by which he be-

queathed his crown to the duke of Normandy; and that this deed was even ratified by the states of the kingdom. But whether such a transaction was really executed, appears extremely doubtful. It is certain, however, that Edward had publicly declared his intentions to this purpose; that William, in consequence of such declaration, had openly avowed his pretensions to the crown of England; and that Harold himself, being on a visit to the Norman court, and having received a promise of the duke's daughter in marriage, had taken a solemn oath to support his title. An artifice which was put in practice, with relation to that oath, in a contract between two of the most conspicuous personages of the age, is worthy of attention, as it exhibits a ludicrous picture of the superstition to which the minds of men were then universally subjected. William secretly conveyed under the altar upon which Harold was to swear, the bones of some of the most revered martyrs; and after the oath was taken, showed the relics to the affrighted nobleman, who discovered, with equal confusion and indignation, that he was ensnared into a much stronger obligation than he had

intended; and that his future breach of promise would be productive of more fatal consequences than he had been aware of.

By what species of casuistry Harold afterwards endeavoured to satisfy his conscience with respect to the violation of this oath, which had, indeed, been in some degree extorted from him, we have no information; but, in fact, he neglected no opportunity of increasing his popularity, and of strengthening his connexions among the nobility; so that, upon the death of Edward, he found himself, before his rival could take any measures for preventing him, in a condition to obtain possession of the throne, and to bear down every appearance of opposition. The duke of Normandy was not of a temper to brook this disappointment, and tamely to relinquish his pretensions. He collected a great army, composed not only of such forces as could be levied in his own dominions, but of all those desperate adventurers whom the prospect of plunder, and of military reputation, allured to the standard of so celebrated a leader. The battle of Hastings, in which Harold and his principal adherents were slain, put an end to the strug-

gle, and left the victorious general without a competitor. This decisive action was followed by a speedy submission to his authority; and the chief of the nobility and clergy, together with Edgar Atheling himself, having made an offer of the vacant throne, he was crowned at Westminster Abbey, with the usual solemnities. It is worthy of notice, that, on this occasion, he took the same oath which had formerly been administered to the Saxon kings, "that he would maintain the ancient fundamental laws of the kingdom;" to which there was added a particular clause, suggested by the peculiarity of the present circumstances, "that he would distribute justice impartially "between his English and his Norman subjects."

The crown of England having thus been transmitted to a foreign family, William, according to the barbarous Latin of those times, received the title of *conquæstor*; which has, without much propriety, been translated the *conqueror*. It imported merely an *acquirer*, in contradistinction to a person who inherits by lineal descent, corresponding to the sense in

which, by the present law language of Scotland, *conquest* is opposed to *heritage* *.

Whether the accession of this monarch is to be considered in the light of a real conquest by force of arms, unsupported by any other circumstance, would be a frivolous question, were it not for the serious and important consequences which have, by some authors, been connected with that supposition. It is maintained, that if William entirely conquered the kingdom, he could be under no restraint in modelling the government; that he, accordingly, overturned altogether the ancient constitution; and in place of that moderate system which had grown up under the Saxon princes, introduced an absolute monarchy. The supposition itself is no less remote from truth, than the conclusion drawn from it is erroneous. It was the party of Harold only that was vanquished by the arms of the Normans; and had

* "*Conquestus* id quod à parentibus non acceptum, sed "labore pretio vel parsimoniâ comparatum possidemus— "Hinc Guliel. I. *conquestor* dicitur que Angliam conquisi- "vit, i. e. acquisivit, PURCHASED; non quod subegit." Spelm. Glossar. v. Conquestus. See also Sken, de verbor. sign.

it not been for the usurpation of that nobleman, William would probably have met with no opposition to his claim. After the defeat of Harold, there was, beside the duke of Normandy, no other candidate able to hold the reins of government. Even supposing William to have completely conquered the whole of the English, his conquest, surely, was not extended over those Norman barons, the associates and companions of his enterprize, to whom he was chiefly indebted for his success. When those powerful chieftains obtained possessions, in England, proportioned to their several merits, and became grandees of the kingdom, it is not likely that they would willingly relinquish the independence which they had enjoyed in their own country, or that they would regard the assistance they had given to their duke, in raising him to be a great king, as a good reason for enslaving them*.

* The duchy of Normandy was at that period governed like most of the other feudal countries of Europe; and the duke, at the same time that he was a feudatory of the king of France, enjoyed a very moderate authority over his Norman vassals. In particular, he could neither make

But, however this be, nothing is more clear in point of fact, than that William was far from wishing to hold himself up to the people of England in the light of a conqueror. Like every wise prince, who has employed irregular and violent measures for obtaining the sovereignty, he endeavoured as much as possible to cover every appearance of usurpation; and was willing to exercise his power in the manner most likely to secure the continuance of it. He was active in restraining his Norman followers from committing depredations on the English, and in preventing disputes between the individuals of those different nations. The partisans of Harold, who had distinguished

laws, nor impose taxes, without the consent of the barons, or principal land-holders of the duchy. This appears from the Latin customs of Normandy, printed at the end of the old French edition of the *Coustumier de Normandy;* in the preface to which it is said; "Quoniam leges et in-"stituta quæ Normanorum principes, non sine magna "provisionis industria prælatorum, comitum, et baronum, "nec non et cæterorum virorum prudentum consilio, et "assensu, ad salutem humani fœderis statuerunt." [Tyrrel's Bibliotheca Politica, dial. 10. Also many instances of Norman great councils, collected by Brady.]

themselves by supporting his cause in the field, were, doubtless, deprived of their possessions; but the rest of the English, who submitted to the authority of the monarch, were treated with marks of his favour and confidence. Many of those who had been in arms against him, were overlooked, or forgiven; and the people in general received assurances of his protection. London, and the other cities of the kingdom, were confirmed in their immunities and privileges. Even Edgar Atheling himself, the lineal heir of the crown, was permitted to live in safety, and to retain the estate and honours which had formerly been conferred upon him. Justice was every where administered, not only with great impartiality, but by tempering clemency with severity; and, the public tranquillity being thus, in a short time, perfectly restored, the government, under the new sovereign proceeded, without interruption, in its former channel*.

* Several historians, who write near that period, consider William's advancement to the English throne as the effect of a formal election. William of Poictou, this king's chaplain, gives the following account of it: "Die ordinationi "decreto locutus ad Anglos concedenti sermone Eboraci "Archiepiscopus, sapiens, bonus, eloquens, an consentirent

But though the constitution was far from being converted into an absolute monarchy, by virtue of an immediate conquest, a considerable change was, about this time, introduced, both in the state of landed property, and in the authority of the sovereign. For this change, the country, during the latter part of the Anglo-Saxon government, had been gradually ripened and prepared. When by the frequent conversion of allodial into feudal estates, the small proprietors of land were at length reduced

" eum sibi dominum coronari inquisivit; protestati sunt " hilarum consensum universi minime hæsitantes, ac si " cœlitus unâ mente datâ, unâque voce, Angloram, quam " facillime Normanni consonuerunt sermocinato apud eos, " ac sententiam præcunctatorium Constantini Præsule, sic, " *electum* consecravit Archiepiscopus," &c.

Odèricus Vitalis, who lived in the reign of William Rufus, speaks of the same event as follows: " Dum Aldredus " Præsul alloqueretur Anglos, et Godofredus Constanti- " niensis Normannos, an concederent Gulielmum regnare " super se, et universi consensum hilarem protestarentur " unâ voce non unius linguæ locutione."

Gul. Gemeticensis, in his history of the dukes of Normandy, agrees with the two authors above quoted, " Ab " omnibus," says he, " tum Normannorum, quam Anglorum roceribus rex *est electus*, &c. Tyrrel's Bibliotheca Polit. dial. 10.

into the condition of military servants, those great lords, who remained at the head of extensive districts, were brought into a more direct opposition and rivalship to one another. Their estates, by gradual enlargement, were become contiguous: and those intermediate possessors, whom they had formerly been employed in subduing, were now distributed upon either side, and ready to assist their respective superiors in their mutual depredations. Those hereditary fiefs, which had been scattered over a multitude of individuals, were now concentered in a few great leaders; who felt a stronger incitement to the exercise of reciprocal hostilities, as well as the capacity of prosecuting them with greater vigour and perseverance, according as their power, together with their pride and their ambition, had been augmented. The public magistrate was often unwilling to interfere in reconciling their differences, and was even pleased to see their force wasted and broken by their mutual ravages. The greater nobles were thus permitted to injure and oppress one another at their own discretion; and, being exposed to such difficulties and distresses as had formerly been sustained by

the proprietors of small estates, were obliged to extricate themselves by similar expedients. They endeavoured to provide against the dangers which threatened them, from the invasion of some of their neighbours, by forming an alliance with others; or, if this resource had proved ineffectual, by courting the favour and soliciting the protection of the king. Nothing less than the power of the crown was capable, in many cases, of delivering them from their embarrassment; and, in order to procure that relief which their situation required, it was necessary that they should promise, upon their part, a return of good offices. If they were anxious to enjoy that security which he bestowed upon his immediate retainers, they could not decently withhold from him the same homage and fealty, or refuse to perform the same services. They found, in a word, that it was expedient for them to resign their allodial property, and, to hold their estates by a feudal tenure as vassals of the crown.

The political theatre, at that time, exhibited a frequent repetition of the same parts by different actors. Those opulent individuals, who had formerly been in a condition to oppress

their neighbours, and force them into a state of dependence upon the sovereign, were, by a different combination of rival powers, or by an alteration of circumstances, rendered, on other occasions, incapable of maintaining their own independence; and being, in their turn, induced to supplicate the interposition of the crown in their favour, were obliged to purchase it by the same terms of submission. As these resignations of land were in the highest degree advantageous to the sovereign, we can have no doubt that the influence of the court would be uniformly exerted, and that every possible artifice would be employed, in promoting them. The great nobles were thus rendered subordinate to the crown in the same manner as the inferior free people had become subordinate to the nobility; the whole kingdom was united in one extensive barony, of which the king became the superior, and in some measure the ultimate proprietor; and the feudal system, as it is called, of which the foundations had been laid several centuries before, was at length entirely completed.

From the state of England, about the accession of the Norman race of kings, a change

of this nature was likely to have happened though it was, undoubtedly, promoted and accelerated by the peculiar circumstances of William the conqueror. From the great abilities of that prince, as well as from the manner in which he ascended the throne, he became possessed of uncommon personal influence; and, by his uniting the duchy of Normandy to the crown of England, the royal demesnes, and the public revenue, were greatly extended. But above all, the numerous forfeitures, incurred by the partisans of Harold, and by such as were incited to acts of rebellion, during the course of William's reign, enabled the sovereign to acquire a prodigious landed territory in England; part of which he retained in the possession of the crown; and the rest he bestowed upon his favourites, under condition of their performing the feudal services.

It must not be overlooked, that this feudal policy was extended to the greater ecclesiastical benefices, as well as to the estates of the laity. The bishops and abbots became immediate vassals of the crown; and, though not bound to the king for personal service in war, were obliged to supply him with a number of

military tenants proportioned to the extent of their possessions. Notwithstanding the great influence of the clergy, supported by the Roman pontiff, who strongly remonstrated against this innovation, yet, as ecclesiastical benefices were enjoyed only for life, those churchmen who expected preferment from the crown were, without much difficulty, prevailed upon to accept of a benefice, under such general conditions as now began to be imposed upon all the great proprietors of land.

The change which was thus effected in the state of the great nobles, was far from being peculiar to England. It was extended, nearly about the same time, over all the kingdoms in the western part of Europe; and in most of them, was the result of no conquest, or violent effort of the sovereign, but appears to have proceeded from the natural course of the feudal governments.

In France the great barons appear to have become the immediate vassals of the crown, in the time of Hugh Capet; whose reign began about eighty years before the Norman conquest; and who obtained the regal dignity, without any appearance of disorder or violence,

by the free election of the national assembly. The feudal institutions having been completed in that kingdom, of which Normandy constituted one of the principal baronies; it is likely that William, when he came into England with a train of Norman vassals, found it the more easy to establish that system, because his followers had already been acquainted with it in their own country.

In the German empire many powerful barons became vassals of the emperor, as early as the reign of Otho the Great; who had likewise been advanced to the sovereignty, not by force of arms, but by the voice of the diet. From particular causes, however, the feudal subordination of the nobility was not rendered so universal in Germany as in other European countries*.

* Concerning the time when the feudal system was introduced into England, authors of great note have entertained very different opinions. Lord Coke, the judges of Ireland who gave their decision upon the case of defective titles, Mr. Selden, the author of the *Mirroir des Justices*, and many others, suppose that it was established under the Anglo-Saxon government. Lord Hale, Mr. Somner, Camden, Dugdale, Matthew Paris, Bracton, maintain that

By this alteration in the state of landed property, the power of the crown was undoubtedly increased; but it was not increased in so great

it was unknown before the Norman conquest.—Sir Henry Spelman, in his Glossary, seems to hold this last opinion; but in his posthumous treatise he explains his meaning to be, only that fiefs did not become *hereditary*, so as to yield feudal incidents, before the reign of William the conqueror. The opinion which I have delivered above seems to account for these opposite conjectures. It seems impossible to deny that there were fiefs among the Anglo-Saxons: on the other hand, it appears equally clear that there were many allodial estates principally in the hands of the great nobility. Nothing therefore remained for William, towards completing the feudal system, but the reduction of these last into a state of vassalage.

We find accordingly, that, in the twentieth year of his reign, this monarch, having finished a survey of all the lands in the kingdom (except those of Northumberland, Cumberland, and Westmoreland) summoned all the great men and landholders, to do homage and swear fealty to him. The expression used in the Saxon Chronicle, in mentioning this fact, is, *Proceres, et omnes prædia tenentes, se illi subdedere, ejusque facti sunt vassalli.* Having become vassals of the crown, at that time, it may be inferred they were not in that condition formerly. It is further probable, that the twenty years which had elapsed, since the accession of William, were occupied in bringing about this great revolution; for if the great men had been crown vassals

a proportion as at the first view may perhaps be imagined. When the allodial estates of the great lords were converted into fiefs, they were invariably secured to the vassal and his heirs. The power and influence of those opulent proprietors were therefore but little impaired by this change of their circumstances. By their tenures they were subject to the jurisdiction of the king's courts, as well as bound to serve him in war; and they were liable for various *incidents*, by which his revenue was considerably augmented; but they were not in other respects dependent upon his will; and, while they fulfilled the duties which their condition required, they could not, with any colour of justice, be deprived of their possessions. Neither was the sovereign capable, at all times, of enforcing the performance of the feudal obli-

during the Saxon government, it was the interest of this prince not to delay their renewal of the feudal engagement by their swearing fealty to him as soon as he came to the throne.

From Doomsday-book, which is now happily laid open to the inspection of all the world, this fact is made still more certain, as innumerable instances occur of landholders, who are said to have held their lands *allodially*, in the reign of Edward, the preceding king.

gations; but from the power of his great vassals, or the exigence of his own situation, he found it necessary, in many cases, to connive at their omissions, and even to overlook their offences.

The reign of William the First was filled with disquietude and uneasiness, both to the monarch, and to the nation. About six months after the battle of Hastings, he found the kingdom in such a state of apparent tranquillity, that he ventured to make a visit to Normandy; in order, as it should seem, to receive the congratulations of his ancient subjects. He probably intended to survey his late elevation from the most interesting point of view, by placing himself in the situation in which he had planned his undertaking, and by thence comparing his former anxious anticipations with his present agreeable reflections. William is, on this occasion, accused by some authors of having formed a resolution to seize the property of all his English subjects, and to reduce them into the most abject slavery. He is even supposed to have gone so soon into Normandy, for the purpose of giving them an opportu niy to commit acts of rebellion, by which a pro-

tence might be afforded for the severities which he had purposed to execute*. But, as this has been advanced without any proof, so it appears in itself highly improbable. It is altogether inconsistent with the prudence and sound policy ascribed to this monarch, not to mention the feelings of generosity or justice, of which he does not seem to have been wholly destitute, that he should, in the beginning of his reign, have determined to crush and destroy the English nobility, merely for the sake of gratifying his Norman barons: since, by doing so, he must have expected to draw upon himself the hatred and resentment of the whole kingdom, and to incur the evident hazard of losing that crown which he had been at so much trouble and expence in acquiring. Although William was, doubtless, under the necessity of bestowing ample rewards upon many of his countrymen, it was not his interest that they should be enriched, or exalted beyond measure. Neither was he of a character to be guided by favourites, or to sacrifice his authority to the weakness of private affection. When he found himself seated upon the English

* Hume's Hist. of England.

throne, it is natural to suppose that he would look upon the dutchy of Normandy as a distant province, or as a mere dependency of the crown of England; and that he would be more interested in the prosperity of the latter country than of the former, as being more immediately connected with his own dignity and reputation. Upon his return from Normandy, William, accordingly, exerted himself in putting a stop to those quarrels which, in his absence, had broke out between his English and his Norman subjects, and in giving redress to the former, for those injuries which they had sustained from the latter. In particular, he endeavoured, every where, to restore the English to those possessions from which they had been expelled, through the partiality, or want of authority in those persons with whom he had left the administration of government.

Several circumstances contributed to render this monarch unpopular, and have subjected his conduct to greater clamour and censure than it appears to have merited.

1. The jealousy with which the English beheld the Normans, whom they looked upon as intruders, and who became the ruling party,

gave rise to numberless disputes, and produced a rooted animosity between them. The partiality which, in such cases, might frequently be discovered, and perhaps was oftener suspected, in the sovereign, or in those to whom he committed the inferior branches of executive power, inflamed the passions of men who conceived themselves loaded with injuries, and excited them to frequent insurrections. By the punishment, which fell unavoidably upon the delinquents, and which could not fail to be regarded by their countrymen as rigorous, new discontents were occasioned, and fresh commotions were produced.

To the aversion which the English conceived against William, as a Norman, and as the friend and protector of Normans, they joined a strong prejudice against those foreign customs which he and his followers had imported. Devoted, like every rude nation, to their ancient usages, they were disgusted with those innovations which they could not prevent; and felt the utmost reluctance to adopt the peculiar manners and policy of a people by whom they were oppressed. The clamours propagated against particular laws of William

the conqueror, which were considered as the most oppressive, may serve to demonstrate, that his subjects had more disposition to complain than there was any reason to justify. It appears that the origin and nature of some of these laws have been grossly misunderstood and misrepresented. The regulation, for instance, that lights should be extinguished in every house by eight in the evening, for the execution of which, intimation was given to the public by the ringing of a bell, thence known by the name of the curfew, has been regarded as the most violent exertion of tyranny; and the most incontestible evidence, not only that William was determined entirely to break and subdue the spirit of the English, but that he was held in continual terror of their secret conspiracies. It is now generally understood and admitted, that this was a rule of police established in the greater part of the feudal nations; as by the extreme sobriety which it enforced, it was peculiarly adapted to the circumstances of a simple people. Another law, the source of much complaint, and deemed an intolerable grievance, was, that when a Norman was robbed or slain, the hundred, within

whose territory the crime had been committed, should be responsible, and subject to a pecuniary punishment. This regulation, which, in all probability, had become necessary, from the multitude of Normans that were daily assassinated, was originally of Saxon institution, and was only accommodated in this reign to the exigence of the times.

2. The extension of the prerogative, by reducing the allodial proprietors of land into a state of vassalage under the crown, was likewise, we may suppose, the ground of dissatisfaction and murmuring to those great barons, who found themselves deprived of their ancient independence, and were exposed to much vexation from those various *incidents*, the fruit of the feudal tenures, that were now claimed by the sovereign. The discontent arising from this cause, and the desire of recovering that condition which they had held under the Anglo-Saxon princes, was not limited to the English nobility; but was readily communicated to those Norman chiefs who had obtained estates in England, and were naturally animated with the ambition of supporting the privileges of their own order in opposition to

the claims of the sovereign. One of the most formidable insurrections, during the reign of William the First, appears to have been excited and conducted by some of the principal Norman barons; and to have proceeded from the impatience of those individuals under that recent authority which the crown pretended to exercise.

3. Another circumstance which contributed, no less than either of those which have been mentioned, to render William unpopular, was the resentment of the clergy, whom he greatly offended by his exactions from them, and by his opposition to the progress of ecclesiastical authority. As the clergy possessed great influence over the people, so they were the only historians of those times; and in estimating the character of any particular prince, they seem to have had no other criterion but the liberality and favour which he displayed to the church. According to his dispositions in this respect, they appear to have extolled or depreciated his virtues, to have aggravated or extenuated his vices, and to have given a favourable or malignant turn to the whole of his behaviour. From these impure fountains the

stream of ancient history contracted a pollution, which has adhered to it even in the course of later ages, and by which it is prevented from reflecting a true picture of the past occurrences.

After all, it cannot be controverted, that this monarch was of a severe and inflexible temper; and that he punished with rigour every attempt to subvert or to disturb his government. That he was rapacious of money, as the great instrument for supporting his authority, must likewise admitted. Among other exactions, he revived a tax, no less hateful than singular, known to the English by the name of *Dane-gelt*, which had been abolished by Edward the Confessor.' It appears to have arisen from an extraordinary contribution, which the Anglo-Saxon kings were under the necessity of levying, to oppose the inroads of the Danes, or to make a composition with those invaders. According to the maxims of prudence, common to the princes of that age, William was not content with providing a revenue sufficient to defray his annual expence; but accumulated a large treasure for the supply of any sudden or extraor-

dinary demand. That he exterminated, however, the whole English nobility, or considerable proprietors of land, or that he stripped them of their possessions, as has been asserted by Dr. Brady and by some later writers, from the authority of some declamatory and vague expressions in one or two ancient annalists, there seems no good reason to believe*.

* This point has been the subject of much disquisition and controversy. See Petit's Rights of the Commons asserted—Atwood's Janua Anglorum ab Antiquo—Cook's Argumentum Antinormanicum—Tyrrell's History—and Bibliotheca Politica, dial. 10. On the other side of the question. Dr. Brady's History, and his various political treatises.

From an inspection of Doomsday-book, it cannot be denied, that William the First, before the end of his reign, had made prodigious changes in the landed property of England, and that very large estates were conferred upon his Norman barons, who had the principal share of his confidence.—But on the other hand, it seems equally clear, that a great part of the landed property remained in the hands of the ancient possessors. Whatever burdens were imposed upon the church, it is not alleged that the clergy, or that any religious societies, which had been established under the Anglo-Saxon government, were deprived of their property. These ecclesiastical estates were of great extent, and the tenants, or knights, who held of the church, were numerous and powerful.

When, at the same time, the situation of William, and the difficulties which he was

Of 60,215 knights' fees, computed to have been in England not long after the conquest, no fewer than 20,015 are said to have belonged to churchmen. It must be owned, however, that when vacancies occurred in church livings, they were most commonly bestowed upon Normans.

With respect to the laity, there are great numbers mentioned in Doomsday-book, as having held estates in the reign of Edward the Confessor. This is so palpable, that even Dr. Brady himself, in answer to the Argumentum Antinormanicum, seems to abandon his assertion, that the English were deprived of their possessions, and contents himself with maintaining, that the nature of their property was changed, by their being reduced into the subordinate state of vassalage.

But even here the fact seems to be misrepresented, and in the list of crown vassals recorded in Doomsday, we may discover great proprietors, who held lands in England before the conquest: such as, *Radulfus de Mortimer*—*Hugo de Porth*—and even in this number we may reckon the *Earl of Morcton*, who, though a Norman, had, along with many others, obtained English possessions in the reign of Edward the Confessor. Among those crown vassals, it seems difficult, in many cases, to distinguish the names of the Norman from those of the Anglo-Saxon families; but there are many which appear to have been appropriated to the latter. Such as, *Oswald*, *Eldred*, *Albert*, *Grimbald*, *Edgar*, *Edmund*, *Alured*.

obliged to encounter, are properly considered, it must on the one hand be acknowledged, that the rigours imputed to him were, for the most part, excited by great provocation; as, on the other, it may be doubted, whether they were not in some degree necessary for reducing the country into a state of tranquillity; and whether a sovereign, endowed with greater mildness of disposition, would not have probably forfeited the crown, as well as involved the kingdom in greater calamities than those which it actually suffered.

William Rufus, the second son of the Conqueror, succeeded to the throne, in preference to Robert his elder brother, from the recom-

It is said indeed, by William of Malmsbury and Henry of Huntingdon, that, about the end of William's reign, no Englishman was either a *bishop*, abbot, or al, in England.

We may add, that, supposing the whole of the English to have been extirpated by William the Conqueror, it would not thence follow that his government became absolute. For what motive could have induced his Norman barons, now become English nobles, and possessed of immense estates, which were secured to them in perpetuity, to acquiesce in any violent extension of the prerogative, to which neither the nobility of Normandy nor of England had been accustomed?

mendation of his father; from the influence of Lanfranc, the archbishop of Canterbury; and from his being, at his father's death, in England to support his claim, while his brother was at a distance. His reign exhibits the same aspect of public affairs with that of his father; the internal discord of the nobles; their frequent insurrections against the sovereign; with his correspondent efforts to keep them in subjection. As by the succession of this prince, the duchy of Normandy, which was bequeathed to Robert by his father, was detached from the crown of England, many of the Norman barons, foreseeing the inconvenience that might arise from a division of their property under different sovereigns, endeavoured to prevent his establishment, and raised a rebellion in favour of Robert. But the same circumstance, which rendered the advancement of William so disagreeable to the Normans, made this event equally desirable to the English, who dreaded the continuance of a connexion, from which, in the late reign, they had experienced so much uneasiness and hard treatment. By their assistance, the Norman rebels were soon defeated; the estates

of the greater part of them were confiscated; and the authority of the king was completely established: a proof that, in the reign of the Conqueror, the English nobility or considerable land-holders were far from being extirpated; and that their power was not nearly so much impaired as has been pretended*.

Not long after, the king passed over into Normandy, with an army, in order to retaliate the late disturbances which had been promoted from that quarter; but before hostilities had

* The expression used on this occasion by William of Malmsbury, is, "Rex videns Normannos pene in una "rabie conspiratos, Anglos probos et fortes viros, *qui* "*adhuc residui erunt*, invitatoriis scriptis arcessit; quibus "super injuriis suis queremoniam faciens, bonasque leges, "et tributorum levamen, liberasque venationes pollicens, "fidelitati suæ obligavit." Ordericus Vitulis says, "Lan- "francum archiepiscopum, cum suffraganeis præsulibus, "et comites *Anglosque naturales*, convocavit; et conatus "adversariorum, et velle suum expugnandi eos, indicavit."

Dr. Brady, whose system led him to maintain that none of the native English retained considerable property in the end of the reign of William the Conqueror, labours to prove, that, by the *Angli Naturales*, and the *Angli qui adhuc erant residui*, Normans, or Frenchmen, who had settled in England, are to be understood, in opposition to such as lived in Normandy, or were but recently come from that country.

been pushed to any considerable length, a reconciliation, between the two brothers, was effected, by the interposition of the principal nobility in both countries; and a treaty was concluded, by which, among other articles, it was agreed, that, upon the death of either, without issue, the survivor should inherit his dominions. Twelve of the most powerful barons on each side became bound, by a solemn oath, to guarantee this treaty: a circumstance which, as Mr. Hume observes, is sufficient to shew the great authority and independence of the nobles at that period. Nothing can afford fuller conviction, that neither this king nor his predecessor, though they undoubtedly extended their prerogative, had been able to destroy the ancient aristocracy, and to establish an absolute despotism.

The reunion of Normandy with the dominions of the English monarch was, however, more speedily accomplished, in consequence of an event, by which, at the same time, all Europe was thrown into agitation. I mean, the *crusades;* which were begun in this reign, towards the end of the eleventh century, and continued for about two hundred years. The

causes which produced those expeditions; the general superstition of the age, by which Christians were inspired with a degree of phrenzy to deliver the holy sepulchre, and the holy land, from the hands of infidels; and the ambitious designs of the Pope, supported by the whole Western church, to extend the dominion of Christianity over both the religion and the empire of Mahomed; these circumstances inflamed most of the princes of Europe with an eager desire of signalizing themselves in a war, from which they had the prospect, not only of the highest reputation and glory in this world, but of much more transcendent rewards in the next. Such motives were peculiarly calculated to work upon the gallant, thoughtless, disinterested character of Robert, the duke of Normandy; who, in the same proportion as he was deficient in political capacity, seems to have excelled in military accomplishments, and to have been possessed with all those religious sentiments, and those romantic notions of military honour, which were fashionable in that age. Embarking, therefore, in the first crusade, and being under the necessity of raising money to equip him for that extraordinary enterprise, he was prevailed upon to mort-

gage, to his brother the king of England, the duchy of Normandy, for the paltry sum of ten thousand marks. William Rufus took no part in that war, and seems to have beheld it with perfect indifference. He was upon bad terms with the clergy, whose resentment he incurred by the contributions which he levied from them; and he has, partly, we may suppose, for that reason, been branded even with irreligion and profaneness. His covetous disposition allowed him to entertain no scruple in taking advantage of his brother's necessities; and, being immediately put in possession of Normandy, his authority, by this extension of territory, and by the distant occupation thus given to Robert, was more firmly established.

This monarch, after a reign of thirteen years, having been killed accidentally, by an arrow aimed at a wild beast, was succeeded by his younger brother, Henry; who immediately seized upon the treasure of the late king, and obtained possession of the throne. The duke of Normandy was at this time in Syria, where he had gained great reputation by his valour. It was to be expected, that, as soon as he should be informed of these transactions, he would take vigorous measures for supporting

his title to the crown of England. Few of the English princes have appeared at their accession to be surrounded with greater dangers and difficulties than Henry the first; but his capacity enabled him to encounter them with firmness, and to extricate himself with dexterity.

During many of the reigns that succeeded the Norman conquest, we find that the demands of the nobility, in their disputes with the sovereign, and the complaints of such as were discontented with the government, were pretty uniformly confined to one topic, "the "restoration of the laws of Edward the con-"fessor." But what particular object they had in view, when they demanded the restoration of those laws, it is difficult to ascertain. That they did not mean any collection of statutes, is now universally admitted; and it seems to be the prevailing opinion, that their demand related to the system of common law established in England before the Norman conquest. From what has been observed concerning the advancement of the feudal system in the reign of William the first, it appears evident, that the nobility had in view the recovery of the allodial property, and the in-

dependence, which they had formerly enjoyed. They saw with regret, we may easily suppose, the late diminution of their dignity and influence; and submitted with reluctance to the military service, and to the other duties incumbent on them as vassals of the crown. The feudal incidents, which were levied by the crown-officers, and of which the extent was not ascertained with accuracy, were, in particular, the source of much vexation, and gave occasion to many complaints. Of these complaints the success was generally proportioned to the difficulties in which the sovereign was involved, and the necessity he was under of purchasing popularity by a redress of grievances.

As Henry the first was exposed to all the odium attending an open and palpable usurpation, and was threatened with an immediate invasion from the duke of Normandy, the acknowledged heir of the crown, he endeavoured to secure the attachment of his barons by yielding to their demands; and, in the beginning of his reign, he granted them a public charter of their liberties, by which the encroachments of prerogative made in the

reign of his father, and of his brother, were limited and restrained. When we examine this charter, the first of those that were procured from the English monarchs after the Norman conquest, we find that, besides containing a clause with respect to the privileges of the church, it relates principally to the incidents of the feudal tenures.

One of the most oppressive of these was *wardship;* by which the king became the guardian of his vassals, in their minority, and obtained the possession of their estates during that period. It is probable that this important privilege had not, in the case of crown-vassals, been yet fully established; since the guardianship of them is, in the charter of Henry the first, relinquished by the king, and committed to the nearest relations*.

The *relief*, or composition, paid by the heir of a vassal, in order to procure a renewal of the investure, was not given up by the sovereign; but the extent of this duty appears to have been settled, with a view of preventing oppression or dispute in particular cases†.

* The charter of Henry I. published by Blackstone.
† Ibid.

The incident of *marriage*, by which, in after times, the superior was entitled to a composition, for allowing his vassals the liberty of marrying, seems, by this charter, to have extended no farther than the privilege of hindering them from forming, by intermarriages, an alliance with his enemies*.

Upon the whole, the parties appear to have intended, in this famous transaction, to compound their differences. The feudal superiority of the crown is permitted to remain; while the nobles are, on the other hand, relieved from some of the chief inconveniences which had resulted from it; and, after the regulations particularly specified, the charter contains a general clause, in which the king promises to observe the laws of Edward the confessor, with such amendments as William the first, with the advice of his barons, had introduced. Copies of this deed were sent to all the counties of England; and deposited in the principal monasteries, in order to preserve the memory of an agreement, by which the prerogative of the crown, and the rights of

* The charter of Henry I. published by Blackstone.

the people, in several important articles, were ascertained and defined.

The popularity which Henry acquired by these prudent concessions, enabled him to defeat the ill-concerted enterprizes of the duke of Normandy; who, becoming the dupe of his brother's policy, was persuaded to resign his present claim to the crown, in consequence of an agreement similar to that which had formerly been made with William Rufus, that, upon the death of either of the two princes without issue, the survivor should inherit his dominions. Not contented with the quiet possession of England, Henry soon after invaded Normandy; gained a complete victory over Robert, and reduced the whole country into subjection. The duke himself, being taken prisoner, was carried over to England, and detained in custody during the remainder of his life, which was eight and twenty years. It is added by some authors, that he lived most part of this time in utter blindness; having, on account of an attempt to make his escape, been condemned to lose his eye-sight. The character of these two brothers appears to exhibit a striking contrast, in the virtues of ge-

nerosity and private affection, as well as in activity and talents for public affairs; and the unfortunate duke of Normandy was no less distinguished by his superiority in the former, than by his inferiority, or rather total deficiency, in the latter.

During a reign of thirty-five years, Henry conducted the administration of government, with constant moderation, and with uninterrupted prosperity. He was attentive to the grievances of his people, vigilant in the distribution of justice, and careful to levy no exactions without consent of the national council. From the progress of ecclesiastical usurpation, he was involved in disputes with the church; but in the course of these he conducted himself with such address, as not only to avoid the resentment, but, in the issue, to become even the favourite of the clergy. His character has, of consequence, been highly celebrated: at the same time, when regarded only in a public view, it seems to merit all the praises with which it has been transmitted to posterity.

Henry left no legitimate sons; and only one daughter, Matilda; who had been first married

to the emperor, and afterwards to the earl of Anjou, by whom she had children. Setting aside the consideration that her father was an usurper, she had, according to the rules of succession in that period, by which females were beginning to inherit landed estates, the best title to the crown; but a great part of the nobility were in the interest of Stephen, a younger son of the count of Blois, and grandson, by a daughter, of William the conqueror. This nobleman, who had long resided in England, and was distinguished by his popular manners, had procured many partizans; and was probably thought the fitter person to wield the sceptre*. After obtaining possession of the sovereignty, he immediately called a parliament at Oxford, in which he granted a charter, confirming all the privileges contained in that of his predecessor; and in the presence of the assembly he took an oath to maintain them; upon which the bishops and peers recognised his authority, and swore fealty to him†. The policy of this monarch was

* Daniel's Hist.

† Ibid. Blackstone, History of the Great Charter.

not equal to his bravery. During the long contest in which he was engaged with Matilda, and her eldest son, Henry, he was generally unfortunate; and, in the end, was obliged to yield the reversion of the crown to the latter.

Henry the second, who succeeded, in right of his mother, but who irregularly mounted the throne in her life-time, had excited sanguine expectations of a prosperous and brilliant reign. To the early display of great activity and abilities, he joined the possession of more extensive dominions than had belonged to any English monarch. Upon the continent he was master of Normandy, Britany, Anjou, Guienne, and other territories, amounting to more than a third of the whole French monarchy. He was, at the same time, a descendant, though not a lineal heir, of the Anglo-Saxon monarchs; his grandmother, the wife of Henry the first, being the niece of Edgar Atheling; a circumstance which contributed not a little to conciliate the affection of the English. Notwithstanding these advantages, his administration, though full of vigour, was clouded with misfortunes. Having conceived the design of repressing the incroachments of the

church, and wishing to excite this in the smoothest and most effectual manner, he promoted to the see of Canterbury his principal favourite, Thomas à Becket, by whose assistance he expected that the direction of his own clergy would be infallibly secured. This prelate, however, happened to possess a degree of ambition, not inferior to that of his master; and no sooner found himself at the head of the English church, than he resolved to dedicate his whole life to the support of ecclesiastical privileges, and of the papal authority.

The particulars of that controversy, which termited so unfortunately, and so disgracefully to the king, are known to all the world. The greatest monarch in Europe, reduced to the necessity of walking three miles barefooted, to the tomb of *Saint Becket;* prostrating himself before that shrine, and lying all night upon the cold pavement of the cathedral, in prayer, and with demonstrations of the deepest penitence, for having offended a man from whom he had received the highest provocation; and, after all, submitting to be scourged by the prior and monks of the neighbouring convent; besides yielding up implicitly all those points

which had been the original cause of the contest: such an unusual and humiliating spectacle cannot fail to excite singular emotions; and it is believed that few readers can peruse this part of our history without visible marks of indignation.

That ecclesiastical tyranny is more extensively mischievous than civil, is indisputable; and that the former should therefore raise greater indignation than the latter, is reasonable. There may be ground for suspecting, however, that our feelings, in the present instance, proceed from a natural bias or prejudice, more than from any such rational or liberal views. The ambition of St. Becket, though accompanied with superior steadiness and intrepidity; and though it may be considered as a purer principle of action, by pursuing the aggrandisement of his own order more than of himself; yet it is less calculated to dazzle the imagination, and to seize our admiration, than that of a Cæsar or an Alexander, who makes his own will the law of his conduct, and who scruples not to tread upon the necks of his people.

Besides the feudal incidents formerly mentioned, which were a sort of rights reserved by

the superior, upon his granting fiefs in perpetuity, there was another pecuniary payment, which grew up in course of time, from the regular duty of military service. As, in many cases, the performance of this duty became inconvenient for the vassal, he was led to offer a sum of money in place of his personal attendance in the field; and such a composition was generally acceptable to the sovereign; who, by means of it, was enabled to hire a soldier more perfectly subject to his direction. The sum payable by the vassal in place of military services, the extent of which was at first determined by an agreement with the king in each case, was denominated a *scutage*. In England, the practice of levying scutages became very general in the time of Henry the second; when the connexions of the sovereign with France gave rise to more expensive enterprizes than had formerly been customary; and consequently induced the crown vassals more frequently to decline their personal attendance.

In this reign the conquest of Ireland, as it is called, was begun and completed. As that island had never been conquered, or even invaded, by the Romans, it retained, with its in-

dependence, a total ignorance of those arts, and of that civilization, which every where accompanied the Roman yoke. It seems, on the other hand, to have escaped, in a great measure, the fury of the Saxons, Danes, and other northern invaders; who never penetrated into that country, but only committed occasional depredations upon the coasts, where they formed some small settlements, and built several towns. Thus, while the greatest part of Europe was, for several centuries, thrown into convulsions by the repeated irruptions of the German or Scythian nations, Ireland was, by reason of its situation, exposed to little disturbance or commotion from any foreign enemy; and the inhabitants were seldom engaged in any military enterprizes, but such as arose from their own private quarrels and depredations. It is therefore highly probable, that, for some time after that country was first inhabited, and while the several families or petty tribes, to whom by its fertility it afforded an easy subsistence, were not much crowded together, they enjoyed more tranquillity than the other barbarians of Europe, and, of consequence, were less counteracted and restrained in those

exertions of generosity and friendship to which, among people who live in small societies, and are strangers to industry, and to the concomitant habits of avarice, there are peculiar incitements. That they might, upon this account, acquire a considerable share of that refinement which is attainable in the pastoral ages, it is natural to suppose; and that they actually did so, the specimens of Celtic poetry, lately published, which have been claimed respectively by the Irish and by the inhabitants of the West Highlands of Scotland, both of whom may, in this case, be considered as one people, appear incontestible evidence. The authenticity of these publications has, indeed, been called in question; but it would require an equal degree of scepticism to doubt, that the groundwork of them is genuine, as it would of credulity to believe, that they are the original production of any modern publisher.

According as Ireland became gradually more populous, a greater number of families came to be united in particular principalities; the leaders of which being actuated by larger views of ambition, found more frequent pretences for quarrelling with each other; and their sub-

jects or followers, being thus involved in more numerous acts of hostility, or in such as were productive of greater violence and outrage, the manners of the people in general were, of course, rendered more ferocious. The whole island came at length to be reduced into four or five extensive districts, under so many different sovereigns; one of which frequently claimed a sort of authority or pre-eminence over all the rest.

After the English monarchy had come to be connected with the continent of Europe, and to interfere in its transactions, it was natural for the king of England to entertain the ambition of adding to his dominions a country so commodiously situated as Ireland, and which appeared to be so little in a capacity of making resistance. Henry the second is accordingly said to have taken some steps for executing a project of this nature, when application was made to him for protection, by Dermot the king of Leinster, who had been driven out of his dominions. In virtue of a bare permission from the king of England, two needy adventurers, Fitzstephen and Fitzgerald, and afterwards Richard, surnamed Strongbow, likewise

a man of desperate fortune, to whom the two former acted in a kind of subordination, landed with a few followers in Leinster; defeated any force that was brought in opposition to them; besieged and took several towns, and formed a settlement in the province. Upon receiving information of their progress, Henry, inflamed, as it should seem, with jealousy of their success, hastened immediately to take possession of the territory which they had subdued; and coming over to Ireland, received the submission of several chiefs or princes of the country, who, dreading the effects of his power, were anxious to avoid any contest with him.

Neither Henry himself, nor his successors for several centuries, appear to have derived any substantial benefit from this acquisition. Their authority was confined to that narrow district inhabited by the English; and even *there* was more nominal than real; for the English inhabitants, harassed by continual inroads from their neighbours, and receiving a very uncertain and casual support from England, were, on many occasions, tempted to throw off their allegiance, and were seduced

to imitate the barbarous manners and practices of the natives.

Henry, in the latter part of his life, was rendered unhappy by domestic misfortunes. A conspiracy was formed against him, by his queen and sons, which became the source of repeated insurrections, accompanied with several very formidable invasions from the neighbouring powers.

Though the king was successful in repressing these disorders, and in defeating all his enemies; yet the obstinacy with which his children persisted in their unnatural attempts, appears to have impressed his mind with deep sentiments of melancholy and dejection. From the difficulties, at the same time, with which he was surrounded, he found it highly expedient to court the good-will of his subjects, not only by a careful attention to the police of the kingdom, but by an equal distribution of justice, but by granting a new charter in the same terms with that of Henry the first*.

Richard the first, who succeeded his father, was entirely engrossed by the love of military

* Blackstone, History of the Great Charter.

glory; and the short period, during which he held the reins of government, was, for the most part, employed, either in preparations for a magnificent crusade, the fashionable achievement of that age, or in oppressive exactions, to relieve him from the burdens which he had incurred by that unfortunate enterprize.

The character of John, his brother and successor, is universally known, as a compound of cowardice, tyranny, sloth, and imprudence. This infatuated king was involved in three great struggles, from which it would have required the abilities of his father, or of his great grandfather, to extricate himself with honour; but which, under his management, could hardly fail to terminate in ruin and disgrace.

It is observed by Mr. Hume, with his usual acuteness, that the extensive territories which the kings of England, at this period, possessed in France, were the source of much less real than apparent strength; and that, from their situation, they were filled with the seeds of revolt and disobedience. In the ordinary state of the feudal tenants, the vassals of the nobility were much more attached to their immediate superior, by whom they were most commonly

protected, and with whom they maintained an intimate correspondence, than with the sovereign, who lived at a distance from them, and with whom they had little connexion. The power of the king, therefore, depended, for the most part, upon the extent of his own demesne; and in every quarrel with his nobles, it was to be expected that all their vassals would take party against him. But in the dominions which the king of England held in France, these circumstances were completely reversed; and his immediate vassals, by their situation, were less capable, on any emergence, of receiving protection from him, than from the French monarch, their paramount superior: not to mention, that they regarded the king of England as a foreign prince, whose interest was commonly very different, and sometimes diametrically opposite to that of their native country. Their affections therefore were gradually alienated from their immediate superior, and transferred to their sovereign; who, it was natural to suppose, might, some time or other, availing himself of his advantageous situation, be enabled to wrest those dominions from his rival. This accordingly hap-

pened in the beginning of the present reign. As John was advanced to the throne in preference to Arthur, the son of his elder brother, and consequently the lineal heir, and as he had incurred great odium in a war with that prince, whom he defeated, and was afterwards believed to have murdered; Philip Augustus at that time king of France, seized the opportunity of interfering in a dispute, which offered so fair a prospect of acquiring popularity, as well as of promoting his interest. Having called a national council, he procured a declaration, that the king of England by his behaviour, had forfeited Normandy, and the other territories which he held in France; and in the greater part of those territories, this decree, from the concurrence of the inhabitants, co-operating with the power of the French crown, was easily carried into execution.

This disaster was followed by a contest with the Roman pontiff, concerning the right of electing the archbishop of Canterbury; in which John was, if possible, still more unsuccessful. In order to remove the papal excommunication which had been inflicted upon him, he was laid under the necessity, not only

of abandoning the points in dispute, but of surrendering his kingdom to the pope, and submitting to hold it as a feudatory of the church of Rome.

The contempt which this abject submission of their sovereign could not fail to excite in the breast of his subjects, together with the indignation raised by various acts of tyranny and oppression of which he was guilty, produced at length a combination of his barons, who demanded a redress of grievances, and the restoration of their ancient laws. As this appeared the most favourable conjuncture which had occurred, since the Norman conquest, for limiting the encroachments of prerogative; the nobility and principal gentry were desirous of improving it to the utmost; and their measures were planned and conducted with equal moderation and firmness. The king attempted, by every artifice in his power, to frustrate their designs. He endeavoured by menaces to intimidate them; and, by delusive promises, to lull them asleep, in order to gain time for breaking their confederacy. When all other expedients proved ineffectual, he made application to the pope as his liege lord; and

called upon his holiness to protect the rights of his vassal. The barons were neither to be deluded nor terrified from the prosecution of their purpose. Finding that their petitions were disregarded, they rose up in arms, and proceeded to actual hostilities. The number of their adherents was daily increased; and the king who retired before them, was deserted by almost all his followers; till at last there were only seven lords who remained in his retinue. All further opposition, therefore, became impracticable. At Runnemede, a large meadow between Windsor and Staines; a place which has been rendered immortal in the page of the historian and in the song of the poet; was held that famous conference, when the barons presented, in writing, the articles of agreement upon which they insisted; and the king gave an explicit consent to their demands*. The

* ——— "Hail Runny-mead!
"Illustrious field! like Marathon renowned!
"Or Salamis, where freedom on the hosts
"Of Persia, from her radiant sword shook fear
"And dire discomfiture! Even now I tread
"Where Albion's ancient barons won the pledge
"Of independence.———

articles were then reduced into the form of a charter; to which the king affixed his great seal; and which, though it was of the same nature with the charters obtained from the preceding monarchs, yet, as it was obtained with difficulties which created more attention, and as it is extended to a greater variety of particulars, has been called, by way of distinction, *the great charter of our liberties.*

As the feudal superiority of the crown, over the nobles, together with the various casual emoluments, or *incidents*, arising from that superiority, had now been established, with little or no interruption, ever since the reign of William the conqueror; it would probably have been a vain project to attempt the abolition of it. The chief aim of the nobility, therefore in the present charter, was to pre-

——"O gallant chiefs! whether ye ride the winds,
"Bound on some high commission to confound
"The pride of guilty kings; or, to alarm
"Their coward spirits, through the realms of night
"Hurl the tremendous comet, or in bowers
"Of blooming Paradise enjoy repose;
"I ween the memory of your patriot zeal
"Exalts your glory, and sublimes your joys."

RICHARDSON.

vent the sovereign from harassing and oppressing them by the undue exercise of those powers, the effects of their feudal subordination, with which he was understood to be fully invested. The incidents of wardship, relief, and marriage, notwithstanding the provisions in the charter of Henry the first, had continued the subject of much controversy; for the removal of which, the nature and extent of those feudal perquisites were more particularly defined and explained. With regard to the practice of levying *aids* and *scutages*, it was provided that the former should not be demanded, unless in the three cases established by the feudal customs, to redeem the sovereign from captivity, to portion his eldest daughter, or to make his eldest son a knight; and that the latter should not be imposed in any case without the authority of parliament*.

The jurisdiction exercised by the king, as a feudal superior, was another source of oppression, for which a remedy was thought requisite; and several regulations were introduced in

* Blackstone's edition of king John's Magna Charta, § 2, 3, 4, 6, 12, &c.

order to facilitate the distribution of justice, to prevent the negligence, as well as to restrain the corruption, of judges: in particular, it was declared, that no count or baron should be fined unless by the *judgment of his peers*, and according to the quality of the offence*.

While the barons were thus labouring to secure themselves against the usurpations of the prerogative, they could not decently refuse a similar security to their own vassals; and it was no less the interest of the king to insist upon limiting the arbitrary power of the nobles, than it was their interest to insist upon limiting that of the crown. The privileges inserted in this great transaction were, upon this account, rendered more extensive, and communicated to persons of a lower rank, than might otherwise have been expected. Thus it was provided that justice should not be *sold*, nor unreasonably *delayed, to any person*†. That no freeman should be imprisoned, nor his goods be distrained, unless by the *judgment of his peers*, or by the law of the land‡; and that even a

* Blackstone's edition of king John's Magna Charta, § 21. † Ibid. § 40. ‡ Ibid. § 39.

villain should not, by any fine, be deprived of his carts and implements of husbandry*.

It is worthy of notice, however, that though this great charter was procured by the power and influence of the nobility and dignified clergy, who, it is natural to suppose, would be chiefly attentive to their own privileges; the interest of another class of people, much inferior in rank, was not entirely overlooked: I mean the inhabitants of the trading towns. It was declared, that no aid should be imposed upon the city of London, unless with consent of the national council; and that the liberties and immunities of this, and of all the other cities and boroughs of the kingdom, should be maintained †. To the same class we may refer a regulation concerning the uniformity of weights and measures, and the security given to foreign merchants, for carrying on their trade without molestation. The insertion of such clauses must be considered as a proof that the mercantile people were beginning to have some attention paid to them; while the short-

* Blackstone's edition of king John's Magna Charta, § 20.

† Ibid. § 13.

ness of these articles, and the vague manner in which they are conceived, afford an evidence equally satisfactory, that this order of men had not yet risen to great importance.

In order to diffuse the knowledge of the charter over the kingdom, and to ensure the execution of it, a number of originals was made, and one of these was lodged in every county, or at least in every diocese; twenty-five barons were chosen, as guardians of the public liberties, and invested with power suitable to the discharge of so important a trust; and the nobles farther required, that, in the mean time, the city of London should remain in their hands, and that the Tower should be put in their possession. The king consented to these measures; though nothing could be farther from his intentions, than to fulfil the conditions of the charter. No sooner had he obtained a bull from the pope annulling that deed, and prohibiting both the king and his subjects from paying any regard to it, than, having secretly procured a powerful supply of foreign troops, he took the field, and began without mercy to kill and destroy, and to carry devastation throughout the estates of all those who had any

share in the confederacy. The barons, trusting to the promises of the king, had rashly disbanded their followers; and being in no condition to oppose the royal army, were driven to the desperate measure of applying to Lewis, the son of the French monarch, and making him an offer of the crown. The death of John, in a short time after, happened opportunely to quiet these disorders, by transmitting the sovereignty to his son Henry the third, who was then only nine years of age.

Under the prudent administration of the earl of Pembroke, the regent, the young king, in the first year of his reign, granted a new charter of liberties; at the same time that the confederated barons were promised a perpetual oblivion for the past, in case they should now return to their allegiance.

It is observable, that a copy of this deed, with some variations, was also transmitted to Ireland, for the benefit of the English inhabitants of that island; who, it was justly thought, had an equal right to all the privileges enjoyed by their fellow-subjects in Britain.

The following year, when peace was concluded with Lewis, and the public tranquillity

was restored, this charter was renewed, with additions and improvements; and, as the charter of king John contained one or two clauses relating to the forest laws, these were now extended, and made the subject of a separate instrument, called the *Charter of the Forest*. The two deeds, into which the original great charter came thus to be divided, were again renewed, with some variations, and confirmed, in the ninth year of Henry the third, when the king was, by a papal bull, declared of age, and began to hold the reins of government.

The charter of the forest, how insignificant soever the subject of it may be thought in the present age, was then accounted a matter of the highest importance. The Gothic nations, who settled in the Roman empire, were, all of them, immoderately addicted to the diversion of hunting; insomuch that this may be regarded as a peculiarity in their manners, by which they are distinguished from every other people, ancient or modern*. It arose, in all probability, from their having acquired very extensive landed estates, a great part of which

* Muratori, Antiq. Med. Æv. tom. ii. diss. 23.—The Romans generally employed their slaves in hunting. Ibid.

they were not able to cultivate; and from their continuing, for many centuries, in that rude and military state, which disposed them to bodily exercise, while it produced such a contempt of industry, and profound ignorance of the arts, as were the sources of much leisure and idleness. The free people, or gentry, commonly allotted to hunting the most part of the time in which they were not engaged in war; and the vassals of every chieftain, or feudal superior, were usually his companions in the former occupation as well as in the latter. Every independent proprietor, however, endeavoured to maintain the exclusive privilege of killing game upon his own grounds; and, having set apart, for the purpose of this amusement, a large portion of uncultivated land, under the name of a *forest*, he denounced severe penalties against his vassals, as well as against every other person, who should hunt upon it without his consent. The sovereign in each kingdom enjoyed the same privilege, in this respect, with the other allodial proprietors; though it appears to have been originally confined within the limits of his own demesnes. The completion of the feudal system, however, by reducing the great

lords to be the vassals of the crown, rendered the sovereign the ultimate proprietor of all the lands in the kingdom; and the privilege of hunting, being thus considered as a branch of the royal prerogative, was not understood, without a special grant in their charter, to be communicated to his vassals. Upon the same principle that the king was alone entitled to kill game within his dominions, he assumed the exclusive privilege of erecting lands into a forrest; by which they were appropriated to the diversion of hunting: at the same time, for preserving the game in the royal forests, a peculiar set of regulations came to be established; and particular officers and courts of justice were appointed for executing such regulations, and for trying offences committed against them.

The diversion of hunting became still more fashionable, and was carried to a greater height in England, than in the countries upon the continent of Europe. The insular situation of Britain enabled the inhabitants in a great measure to extirpate the fiercer and more hurtful species of wild animals; so as to leave no other but those which, placing their whole safety in flight, directed the attention of the people to

the pleasure merely of the chace. Hunting, therefore, in Britain, came to consist in a long and intricate pursuit, admitting the display of much art and skill; while, upon the continent, it was often a sort of combat with wild animals, requiring only a momentary exertion of strength and courage, or at most, of military dexterity. As the inhabitants of this island were, besides, less engaged in distant wars than the other European nations, they had, upon that account, more leisure to employ themselves in rural sports. It has farther been alleged, that Britain was anciently famous for its breed of slow-hounds, a species of dogs peculiarly fitted for the improvement of the chase; but whether this ought to be regarded as one cause of the national propensity to this diversion, or rather as the effect of it, there may be some reason to doubt. It is more probable that the English were led early to cultivate the breed of slow-hounds, because they were much addicted to that mode of hunting which required those animals, than that this kind of dogs, from something unaccountable in the nature of our soil and climate, were

the original and peculiar growth of our country*.

We may remark, by the way, that the English manner of hunting, and their fondness for that sport, has been the cause of another peculiarity, their passion for horse-racing. When hunting came to consist entirely in a pursuit, there was a necessity that the company should, for the most part, be on horseback; and when different sportsmen were engaged in the same chace, they had frequently occasion to vie with one another in the swiftness of their horses; which naturally produced a more formal trial, by running in a stated course; while the improvement of this latter diversion excited the people to cultivate that breed of race-horses which is now reckoned peculiar to the country.

During the whole period of the Anglo-Saxon government, the great lords, who possessed allodial estates, appear to have enjoyed the privilege of hunting upon their own

* That England was anciently famous for its breed of slow-hounds, appears from Strabo, c. 4. The French, under the kings of the Merovingian race, were accustomed to procure hunting dogs from England. Velly's Hist. vol. i.

ground, independent of the sovereign*. But, in consequence of that feudal superiority over the nobles, which was acquired by the crown upon the accession of William the first, it became a maxim, that the killing of game was a branch of the royal prerogative, and that no subject had any right either to possess a forest, or even to hunt upon his own estate, unless by virtue of a charter from the crown.

In this part of the prerogative, William the conqueror, and his immediate successor, are said to have committed great abuses. As those princes were excessively addicted to the amusement of hunting, they laid waste very extensive territories, in different parts of England, in order to convert them into forests; having, for that purpose, demolished many houses, and even villages, and expelled the inhabitants. New and savage penalties were inflicted upon

* By a law of Canute the Great, whose authority was more extensive than that of his predecessors, the right of the nobles to protect the game upon their own grounds seems to be laid under restrictions. The words are, "Volo "ut omnis liber homo, pro libito suo, habeat venerem, "sive viridem, in planis suis super terras suas, sine chacea "tamen, et devitent omnes meam, ubicunque eam habere "voluero."

such as encroached upon the King's game, or committed any trespass in his forests; and the laws upon this subject were executed in a manner the most rigorous and oppressive.

It may, indeed, be suspected that these abuses have been somewhat exaggerated. The extension of the prerogative, with respect to the privilege of hunting, must have been highly offensive to the nobles; and could hardly fail to excite loud complaints, together with some degree of misrepresentation, against the proceedings of the crown. The erection of great forests, even though these had been confined within the demesnes of the king, was likely of itself to occasion much popular clamour; as in our own times, the change of a large estate from tillage to pasturage, by which many tenants are deprived of their livelihood, is frequently the source of much odium and resentment. There is reason, however, to believe, that these exertions encroached, in some cases, upon the private property of individuals, and were, therefore, no less unjust than they were unpopular.

The charter of the forest contained a variety of salutary regulations for mitigating the seve-

rity of the laws upon that subject, for the rectification of the former abuses, and for preventing the future encroachments of the sovereign. In the proceedings against those who trespassed upon a forest, a greater degree of regularity was introduced; and capital punishments were, in all cases, abolished. The invasions of private property, by erecting a royal forest, except upon the demesnes of the crown, were prohibited; and it was ordained that all the lands belonging to particular persons, which, from the reign of Henry the second, had been included within the boundaries of a forest, should be *disaforested*, and restored to the owner*.

The long reign of Henry the third, from the feeble character of that monarch, and from the injudicious, the inconstant, and the arbitrary measures which he pursued, according to the different favourites by whose counsel he happened to be governed, was filled with insurrections and disorders; and in the latter part of it, the rebellion, conducted by the daring ambition and great abilities of Simon Montfort, the earl of Leicester, had reduced

* See the Charter published by Blackstone.

the sovereign to the most desperate situation, and threatened to deprive him of his crown; when his enemies were unexpectedly and completely defeated, by the intrepidity, steadiness, and good fortune of his son Edward. During the course of these commotions, Henry, in order to appease his barons, granted, more than once, a renewal of the great charter, and the charter of the forest. He also swore, in the most solemn manner, to preserve them inviolable; an oath to which, after he was relieved from the present embarrassment, he appears to have shewn little regard.

We may here take notice, though it falls beyond the period which we are now considering, that another solemn confirmation of these charters was afterwards obtained in the vigorous and successful reign of Edward the first.

1. When we take a view of these great transactions, and endeavour to estimate the degree of attention which they merit, their number, their similarity, and the long intervals of time at which they were procured, are circumstances which cannot be overlooked. Had one charter only been granted by the sovereign, on a singular occasion, it might well be sup-

posed to have arisen from a concourse of accidents, and from partial views. Instead of expressing the opinions entertained by the king and his people, concerning the rights of either, it might, in that case, have been the effect of a mere casual advantage, which the one party had gained over the other; and, so far from displaying the ordinary state of the government at that period, it might have exhibited the triumph and injustice of a temporary usurpation. But those important stipulations, not to mention the frequent confirmations of them in a later period, were begun and repeated under the reigns of six different monarchs, comprehending a course of about two hundred years; they were made with princes of extremely different characters, and in very opposite situations; and though, by the insertion of different articles, those deeds were gradually expanded, and accommodated to the circumstances of the times, yet their main object continued invariably the same; to limit those abuses of prerogative, which, from the advancement of the feudal system, and from the nature of the monarchy, were most likely to be committed. Taking those charters, therefore, in connexion

with one another; they seem to declare, in a clear and unequivocal manner, the general and permanent sense of the nation, with respect to the rights of the crown; and they ascertain, by express and positive agreement between the king and his subjects, those terms of submission to the chief magistrate, which, in most other governments, are no otherwise explained than by long usage, and which have therefore remained in a state of uncertainty and fluctuation.

2. It seems to be a common opinion, that, by these charters, the crown was deprived of many of those powers which had been assumed by William the conqueror, or by his son William Rufus, and the constitution was brought nearer to that equal balance, which it had maintained under the direction of the Saxon princes. In particular, by the charter of king John (for the preceding charters have been in a great measure overlooked) it has always been supposed that the bounds of the prerogative were greatly limited. But upon examination it will be found, that this opinion is contrary to the real state of the fact. During the whole period which we are now considering; that is,

from the Norman conquest to the time of Edward the first; while the barons were exerting themselves with so much vigour, and with so much apparent success, in restraining the powers of the crown, those powers were, notwithstanding, continually advancing; and the repeated concessions made by the sovereign, had no farther effect than to prevent his authority from increasing so rapidly as it might otherwise have done. For a proof of this we can appeal to no better authority than that of the charters themselves; from which, if examined according to their dates, it will appear, that the nobility were daily becoming more moderate in their claims; and that they submitted, in reality, to a gradual extension of the prerogative; though, by more numerous regulations, they endeavoured to avoid the wanton abuses of it. Thus, by the great charter of Henry the third, the powers of the crown are less limited than by the charter of king John; and by this last the crown vassals abandoned some important privileges with which they were invested by the charter of Henry the first.

In the charter of Henry the first, *the inci-*

dent of wardship, the severest and most oppressive of all the feudal incidents, is relinquished by the sovereign; and the heirs of a vassal being thus allowed to continue the possession of the fief, during their minority, that is, at a period when they could not perform the feudal service, were in a great measure restored to that allodial property which, before the Norman conquest, their predecessors had enjoyed. But, in the reign of king John, the incident of wardship had taken such root, that the crown vassals no longer thought of disputing the continuance of it; but were satisfied with procuring some regulations to prevent abuses in making it effectual. From this period, therefore, the nobles must be understood to acknowledge that they had no other claim to the enjoyment of their estates than as a consideration for the performance of military service.

According to the charter of Henry the first, the *incident of marriage* extended no farther than to prevent the crown vassals from marrying any woman, with whose family the superior was at variance; a restriction which was not likely to be very oppressive, and which was in some degree necessary for maintaining the

public tranquillity. But in the time of king John this incident had been so much enlarged, as to imply a right in the superior to prohibit his vassals from marrying without his consent, and even to require that they should marry any woman whom he presented to them. In the charter of that prince, therefore, it is provided, that the heirs of a vassal shall be married without *disparagement*, that is, they shall not be required to contract unsuitable alliances; and, to secure them from imposition or undue influence, in a matter of this kind, it is farther stipulated, that before they contract any marriage their nearest relations shall be informed of it.

The charter of king John may, on the other hand, be compared with that of Henry the third, in relation to *aids* and *scutages*, a sort of indirect taxes, from which a considerable part of the crown revenue was derived. By the charter of John, the exclusive power of imposing those duties is committed to parliament; but that of Henry the third is entirely silent upon this point; and leaves the monarch under no restraint in imposing such burdens by virtue of his own prerogative. It is true, that the former limitation upon this part of the prero-

gative was afterwards renewed in the reign of Edward the first*.

What I have observed concerning the variations in the series of great charters, does not seem applicable to the laws of the forest. The violations of private property committed in this respect by William the first, and his successors, were too notorious to be seriously defended; and therefore, notwithstanding the general progress of monarchy, it was thought necessary to remove these abuses, and to guard against them for the future.

3. Whoever enquires into the circumstances in which these great charters were procured, and into the general state of the country at that time, will easily see that the parties concerned in them were not actuated by the most liberal principles; and that it was not so much their intention to secure the liberties of the people at large, as to establish the privileges of a few individuals. A great tyrant on the one side, and a set of petty tyrants on the other, seem to have divided the kingdom; and the great body of the people, disregarded and oppressed on all hands, were beholden for any privileges be-

* 34 Edw. I. stat. 4. cap. i.—Also 25 Edw. I. 2, 5, 6.

stowed upon them, to the jealousy of their masters; who, by limiting the authority of each other over their dependants, produced a reciprocal diminution of their power. But though the freedom of the common people was not intended in those charters, it was eventually secured to them; for when the peasantry, and other persons of low rank, were afterwards enabled, by their industry, and by the progress of arts, to emerge from their inferior and servile condition, and to acquire opulence, they were gradually admitted to the exercise of the same privileges which had been claimed by men of independent fortunes; and found themselves entitled, of course, to the benefit of that free government which was already established. The limitations of arbitrary power, which had been calculated chiefly to promote the interest of the nobles, were thus, by a change of circumstances, rendered equally advantageous to the whole community as if they had originally proceeded from the most exalted spirit of patriotism.

When the commons, in a later period, were disposed to make farther exertions, for securing their natural rights, and for extending the

blessings of civil liberty, they found it a singular advantage to have an ancient written record, which had received the sanction of past ages, and to which they could appeal for ascertaining the boundaries of the prerogative. This gave weight and authority to their measures; afforded a clue to direct them in the mazes of political speculation; and encouraged them to proceed with boldness in completing a plan, the utility of which had already been put to the test of experience. The regulations, indeed, of this old canon, agreeable to the simplicity of the times, were often too vague and general to answer the purposes of regular government; but, as their aim and tendency were sufficiently apparent, it was not difficult, by a proper commentary, to bestow upon them such expansion and accommodation as might render them applicable to the circumstances of an opulent and polished nation.

CHAPTER II.

In what Manner the Changes produced in the Reign of William the Conqueror affected the State of the national Council.

THE changes in the state of landed property, arising from the completion of the feudal system, in the reign of William the first, were necessarily attended with correspondent alterations in the constitution and powers of the national council. The Saxon Wittenagemote was composed of the allodial proprietors of land; the only set of men possessed of that independence which could create a right of interfering in the administration of public affairs. The number of these, having been originally very great, was gradually diminished, according as individuals were induced, from prudential considerations, to resign their allodial property, and to hold their estates of some feudal superior. But in the reign of William the conqueror, when the most powerful of the nobility, those who alone had hitherto retained their allodial property, became at last the immediate vassals

of the crown, the ancient Wittenagemote was of course annihilated; since there no longer existed any person of rank and character which had been deemed essential to the members of that assembly.

As, during the government of the Anglo-Saxon princes, every feudal superior had a court, composed of his vassals, by whose assistance he decided the law-suits and regulated the police of his barony; so the king, considered in the same capacity, had likewise a private baron-court, constituted in the same manner, and invested with similar powers. In that period, however, the former of these courts, being held by allodial proprietors, acknowledging no farther subjection to the king than as chief magistrate of the community, were totally independent of the latter. But in the reign of William the conqueror, when the whole of the nobility became vassals of the crown, they were incorporated in the king's baron-court, and the jurisdiction which they exercised in their own demesne was rendered subordinate to that of the king as their paramount superior. The several districts, which had formerly been divided into so many independent lordships,

were now united in one great barony, under the sovereign; and his baron-court assumed, of consequence, a jurisdiction and authority over the whole kingdom. Thus, upon the extinction of the Wittenagemote, there came to be substituted, in place of it, another court or meeting, similar to the former, and calculated for the same purposes, though constituted in a manner somewhat different. To this meeting, as the Norman or French language was now fashionable in England, and even employed in public deeds and legal proceedings, the name of *parliament* was given; as the meeting itself corresponded, not only to the assembly known by the same appellation in France, but to the national council of all those European countries in which the feudal system had attained the same degree of advancement*.

The English parliament, though its members appeared under a different description,

* It has been alleged, that the name of parliament was bestowed upon the English national council even in the reign of Edward the confessor, at which time the French language began to be fashionable in England.—Discourse on the English government, published by Nathaniel Bacon.

comprehended in reality the same class of people who had been members of the ancient Wittenagemote. It was composed of all the immediate vassals of the crown; including the dignified clergy, and the nobility, whether of English or of French extraction. The wealth of these persons, from the successive accumulations of property before, and in the reign of William the conqueror, must have been prodigious. From the survey in doomsday-book it appears, that, about the end of William's reign, the immediate vassals of the crown were in all about six hundred: so inconsiderable was the number of baronies, whether in the hands of laymen or ecclesiastics, into which the whole territory of England, exclusive of Wales, and the three northern counties, and exclusive of the royal demesnes, had been distributed*.

* The separate baronies in the different counties, including the lands in the crown demesne, amount in all to 1462. But as the same persons were often possessed of estates in many different counties, it is matter of some labour to distinguish the exact number of separate proprietors. For example, the king himself held lands in every county except Shropshire.—Comes Moritoniensis possessed

Notwithstanding the vassalage into which the barons had been reduced, their influence was but little impaired; and, though changed in outward appearance, they continued to maintain that authority which great landed estates will always procure. By the nature of their tenures, their property was not rendered

baronies in 20 counties.—Comes Eustachius, in 11.—Comes Rogerius, in 13.—Willelmus de Warenna, in 12.—Edwardus Sarisberiensis, in 9.—Willelmus filius Ansculfi, in 11.—Hunfridus Camerarius, in 9.—Comes Alanus, in 11.—Comes Hugo, in 21.—Ernulfus de Hesding, in 10.—Radulphus de Mortemer, in 13.—Episcopus Cantuarensis, in 8.—Episcopus Baiocensis, in 17.—Episcopus Wentoniensis, in 11.—Abbatea Westmonasterii, in 14.—Episcopus Lincolcensis, in 9.

After a pretty accurate scrutiny, it is believed the separate crown-vassals, recorded in doomsday-book, are not above 605, though they may possibly be one or two below that number. Of these, the ecclesiastical vassals, including the different sorts of religious societies, amount to about 140. It is to be observed, however, that some of these appear to have belonged to Normandy, though they possessed lands in England.

It is evident that the power and influence of the crown-vassals, in the reign of William the conqueror, must have been great in proportion to the smallness of their number, and the vast extent of their property.

more precarious than formerly; but merely subjected to certain burdens or exactions in favour of the king. As vassals of the crown, their dependence upon it was even slighter than that of the inferior hereditary vassals upon their immediate superior; and, from their number, their distance, and their vast opulence, the king was less able to retain them in subjection. Standing frequently in need of their support and assistance, he found it highly expedient to avoid their displeasure, to consult them in matters of a public nature, and to proceed with their approbation. In their new capacity, therefore, they still assumed the privilege of controlling the abuses of administration; and in directing the great machine of government, their power was little inferior to that which had formerly been possessed by the Wittenagemote*.

* That parliaments were frequently held by William the conqueror, and by his son William Rufus, as well as by the succeeding monarchs, is indisputable. In the fourth year of William the conqueror, the laws of Edward the Confessor were confirmed by a great national council. H. Hoveden. Annal. Also Selden, Spicilegium in

The power of declaring peace and war was from this time, indeed, regarded as a branch of the royal prerogative. It was a principle inseparably connected with the feudal polity,

Eadmerum.] It is doubtful whether this was the same parliament which confirmed the collection of Edward the Confessor's laws, preserved by Ingulphus, the abbot of Croyland, and secretary to William the First. Selden, ibid.—Another parliament was held in 1070, for terminating a dispute between the archbishop of York and the bishop of Worcester.—*Coram rege et dorobuniæ archiepiscop. Lanfranco, et episcopis abbatibus, comitibus, et primatibus, totius Angliæ.* Dr. Brady's Tracts.—Another parliament is mentioned in 1084, for changing the canons of Durham into monks—*Præsentibus omnibus episcopis et baronibus meis.* Ibid.—See also in the same author, the instances of national councils convened by William Rufus.

The whole territory of England not having been united as the feudal barony of the king, till near the end of the Conqueror's reign, his parliament or baron-court could not, before this period, be properly invested with an authority over the whole kingdom. It is probable, however, that this circumstance was overlooked; and that, as a great part of the nobility, soon after the conquest, were become vassals of the crown, they were called, in that capacity, to the national council; while others, who still retained their allodial property, might be willing perhaps, without regarding the difference of their situation, to join in the deliberations of that assembly.

that the vassals of the king, as well as those of every subordinate baron, should be liable for military service to their liege lord, and should be ready to attend him in the field whenever he chose to call upon them. To determine the particular quarrels in which he should engage, and the military enterprises which he should undertake, was his province, not theirs; and, provided their attendance was not more burdensome than their duty required, it was understood to be a matter of indifference to them, against what enemy they should happen to be employed. The discretionary power, which came thus to be assumed by the king, as the great feudal superior of the kingdom, was, at the same time, supported by the consideration of its expediency. During the numerous invasions customary in the feudal times, it was necessary, upon any sudden emergency, that the leader of a barony should take his measures upon the spot; and that without consulting his vassals, he should proceed to repel the enemy by force of arms. To call a council, in such a case, would be to lose the critical moment; to waste, in deliberation, the proper season for action; and, for the sake

of a punctilio, to involve the whole community in utter destruction.

This may be accounted the chief difference between the Anglo-Saxon and the Anglo-Norman government. In the former, the power of making peace and war was invariably possessed by the Wittenagemote, and was regarded as inseparable from the allodial condition of its members. In the latter, it was transferred to the sovereign: and this branch of the feudal system, which was accommodated, perhaps, to the depredations and internal commotions prevalent in that rude period, has remained in after ages, when, from a total change of manners, the circumstances, by which it was recommended, have no longer any existence.

The legislative power was viewed in a different light. New regulations generally took their origin from a complaint of grievances, made to the sovereign, the great executor of the law, and accompanied with a request, that, in the future administration of government, they might be redressed. The privilege of preferring such petitions, or at least that of de-

manding a positive answer to them from the sovereign, was anciently appropriated to the Wittenagemote; and, upon the dissolution of that assembly, was devolved upon the Anglo-Norman parliament. In every subordinate barony into which the kingdom was divided, the vassals exercised a similar privilege with respect to the conduct of their own superior. A public statute was, according to this practice, a sort of paction or agreement between the king and his vassals, by which, at their desire, he promised to observe a certain rule of conduct; and in which, therefore, the consent of both was clearly implied. No such rule was ever thought of without the previous request of parliament, nor was it ever effectual to bind the parties, unless the sovereign acceded to the proposal.

The supreme distribution of justice was likewise a matter of such consequence as to require the interposition of the crown-vassals; and therefore constituted another privilege of the Anglo-Norman parliament. How this branch of business came, in ordinary cases, to be devolved upon an inferior court, with re-

servation of an ultimate controlling power in the parliament, will be the subject of a separate inquiry.

Taxation is properly a branch of the legislative power; since every rule that is made, with respect to the payment of taxes, is a law which directs and limits the future administration of government. This branch of legislation is in itself of greater importance, and it is more likely to be abused, than any other; because every member in the community has an interest to avoid all public bargains, and to roll them over upon his neighbours; while the chief executive officer, or whoever has the management and disposal of the revenue, is interested to squeeze as much as he can from the people. We may easily suppose, therefore, that as the vassals of the crown, after the Norman conquest, assumed the ordinary exercise of the legislative power, they would not be disposed to relinquish that peculiar branch of it, which consisted in the imposition of taxes; and there is, accordingly, no reason to doubt, that, as far as it could exist in that period, the power of taxation was immediately transferred

from the Wittenagemote of the Saxons to the Anglo-Norman parliament.

But in that age, there was little occasion for exercising this power; few taxes being then, directly at least and avowedly, imposed upon the nation. The chief support of the crown was derived from a revenue independent of the people; and when additional supplies became requisite, they were obtained, either by means of a private bargain, for a valuable consideration; or under the mask of a gift or voluntary contribution.

At a period when mercenary armies were unknown, and when the administration of justice, instead of being a burden upon the crown, was the source of emolument, the royal demesnes, which, after the accession of William the first, became prodigiously extensive, together with the profits of amerciaments and fines, and the common feudal rents and incidents arising from the estates of crown-vassals, were fully sufficient to maintain the dignity of the sovereign, and to defray the ordinary expence of government. This ancient revenue, however, was gradually improved, according to the

increasing charges of government, by the addition of *scutages*, *hydages*, and *talliages*.

The first were pecuniary compositions paid by the crown-vassals, in place of their military service; and, being settled, in each case, by a stipulation between the parties, had no resemblance to what is properly called a tax. It was always in the power of the vassal to insist upon such terms, with respect to this composition, as he judged expedient, or to avoid the payment of it altogether, by performing the service for which he was originally bound. The sum paid was a voluntary commutation; and therefore it must be understood that he who paid it thought himself a gainer by the bargain.

Hydages were due by the soccage-vassals of the crown; who, beside their constant yearly rent to their superior, were bound to supply him with carriages, and to perform various kinds of work. As these were, by their nature, somewhat indefinite, they came to be frequently exacted by the crown-officers in an oppressive manner; and, when the vassal rose to a degree of wealth and independence, he was willing to exchange them for a pecuniary

payment, which might, at the same time, vist of more profit to the crown. Of this nature the extent was originally fixed, as source of the scutage, by an agreement in each case between the parties.

Talliages were paid, in like manner, by the inhabitants of towns in the king's demesne. As the king protected his boroughs, and bestowed upon them various privileges, with respect to their manufactures, so he levied from them such tolls and duties as they were able to bear. According as those communities became opulent and flourishing, their duties were multiplied, and rendered more troublesome and vexatious; from which it was at length found convenient that they should be converted into a regular pecuniary assessment*.

The trade of the country, however inconsiderable, became also the means of procuring some revenue to the sovereign. Persons engaged in this employment, standing in need of the protection of government, and being also frequently destitute of conveniencies for trans-

* The name of talliage is frequently extended to every pecuniary contribution levied by the superior from his vassals.

[redacted]ting and vending their goods, were not only [redacted]but even sometimes provided with ware[redacted]d with measures and weights, by the king; who, in return, demanded from them, either a part of their commodity, or some other payment suited to the nature of the benefit which they had received. A similar payment was demanded by the king upon the passage of goods from one port of the kingdom to another. To the duties which came thus to be established by long usage, was given the appellation of *customs*. Having arisen from the demands of one party, and the acquiescence of the other, they were in reality founded upon a sort of stipulation or mutual agreement.

When all these branches of revenue proved insufficient, the king upon any extraordinary exigence applied for an *aid*, or general contribution from his vassals. We find that aids are enumerated among the feudal incidents; but, exclusive of the three cases formerly mentioned, whatever was contributed in this manner, appears to have been regarded in the light of a free gift; and, according to this view, came afterwards to be denominated a *benevolence*.

Though none of those duties, which were

levied by the express or implied consent of parties, could with propriety be considered as taxes, they became in reality the source of much oppression and injustice. It was dangerous to refuse the sovereign, even when he demanded a thing to which he had no right. It was difficult to make an equal bargain with a person so greatly superior in power and influence. By adhering strictly to their privileges, and by incurring the resentment of the king, the people subjected to those impositions might be utterly ruined; and were, on every occasion, likely to lose much more than the value of what was demanded from them. When the abuses, however, of which the crown was guilty in relation to these exactions, had risen to a certain height, they became the subject of general complaint, and attracted the notice of the legislature. Scutages, payable by the military vassals of the crown, came to be fixed by parliament, of which those vassals were members. After the soccage tenants and the burgesses had acquired a degree of opulence, the same rule was extended to the hydages, and the talliages, levied from those two orders of men. The aids, demanded promiscuously from all the different

sorts of crown vassals, came to be regulated by the same authority*. The customs, originally of little importance, were, by the gradual extension of trade, and the increasing demands of the crown, brought likewise into public view, and acquired such magnitude as to occasion the interposition of parliament. By a statute in the reign of Edward the first, it is provided that those duties shall not be levied without the "common assent of the realm †."

With respect to the manner of convening the national council, it was not immediately varied by the Norman conquest. The parliament, from the accession of William the first, was held, like the Wittenagemote in the Saxon times, either according to ancient usage, at the three stated festivals of Christmas, Easter, and Whitsuntide, or, upon particular exigencies, by virtue of a summons from the king. By degrees, however, the occasional meetings extended the subjects of their deliberation; while,

* With regard to aids, and scutages, this provision is made in the charter of king John, § 12. The statutes 25 Edward I. c. 5, 6. and 34 Edward I. contain the same regulation with respect to aids and tailliages.

† 25 Edw. I. c. 7.

on the other hand, the regular customary assemblies were frequently prevented by the disorderly state of the country. In the war between the empress Matilda and king Stephen, they met with great interruptions, and from the beginning of the convulsions in the reign of king John, were entirely discontinued. The power of calling parliaments, and consequently of putting a negative upon its meetings, was thus in all cases devolved upon the sovereign*.

From these particulars, it is evident, that the English monarchs, after the Norman conquest, were far from possessing an absolute authority; and that the constitution, notwithstanding the recent exaltation of the crown, still retained a considerable proportion of the preceding aristocracy. As the national council, composed of the nobility or great proprietors of land, was invested with the legislative power, including that of imposing taxes, and with the power of distributing justice in the last resort, it enjoyed, of course, the right of controlling and directing the sovereign in the most important parts of administration.

* Gordon's History of Parliament.

From the state of the revenue, indeed, in that period, the executive power was under less restraint from the legislature than it has become in later ages. As the king had seldom occasion to solicit a supply from parliament, he was the less liable to be questioned about the disposal of his income. The people, who gave nothing to the public magistrate for defraying the expence of government, had but little incitement or pretence, either to find fault with his œconomy, or to require a strict account of his management. He managed the revenue of the kingdom, as other individuals were accustomed to manage their own estates; and the idea of a public officer, or magistrate, was apt to be sunk in that of an ordinary proprietor, to whom the crown, and the revenues connected with it, have been transmitted like a private inheritance.

It must at the same time be admitted, that abuses in the exercise of the executive power were then extremely frequent, and were often suffered to pass without animadversion or notice. The legislature had too little experience, to provide regulations for preventing the numerous instances of malversation in office that

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were likely to occur; judicial establishments had not yet attained such perfection as might enable them with quickness to punish the several violations of justice; nor had long usage established those equitable maxims of government, which are the common effects of polished manners, and which often supply the place of positive institutions. The conduct of the sovereign, therefore, and even that of inferior officers, in the ordinary course of administration, was in a great measure discretionary; and was no otherwise restrained, than by the fear of exciting general clamour and disturbance. But individuals might sustain much oppression before their complaints were likely to excite attention, and might be disposed, from prudential considerations, to submit to many injuries and inconveniencies, rather than contend against the whole force of the crown. In this disorderly state of society, persons who preferred any request to the king, or who had even any claim of right, in which his interest was concerned, were commonly induced to secure his favour by a present, or, if you will, by a bribe. A numerous list of those presents, which were made to the sovereign, in order to

procure what was barely justice, has been collected by different authors, with a view of demonstrating the despotical nature of the Anglo-Norman government. But these instances tend only to prove the frequency of abuses, from the want of a regular polity, extending to all the departments of administration. They shew that the government was rude and imperfect, and therefore in many cases arbitrary; not that it was an absolute monarchy: that the national council was negligent and unskilful in restraining disorders; not that it was destitute of authority to limit the prerogative. This is what happens in the infancy of every political system, whatever be the peculiar plan upon which it is formed. The strong find themselves often at liberty to oppress the weak; persons of inferior station are therefore obliged to shelter themselves under the wings of a superior; and are glad to obtain, by solicitation or bribery, the quiet exercise of those rights which they are unable to maintain by any other means.

What puts this observation in a clear light is, that the abuses of the executive power, which were so frequent in the early periods of

the English constitution, have since been removed by the gradual improvement of arts, and the correspondent progress of manners, without any considerable change in the distribution of the great powers of government. The outlines of the English constitution are not very different, at this day, from what they were in the reign of William the Conqueror; but the powers which were then universally acknowledged, have been since more minutely applied to the detail of administration; and the variations, that have occurred in the modes of living, and in the condition of individuals, have been gradually accommodated to the spirit of the old institutions. The experience of the nation has led them to fill up the picture, of which a rude sketch was delineated in that early period.

CHAPTER III.

Of the ordinary Courts of Justice after the Norman Conquest.

THE distribution of justice, in the last resort, was not the most brilliant or conspicuous, though it was, undoubtedly, one of the most useful departments belonging to the national council. During the latter part of the Anglo-Saxon government, this branch of business was commonly devolved upon occasional meetings of the Wittenagemote; which being called for discussing matters of inferior concern, were seldom attended by any other members than such as happened, at the time, to be retained about the king's person. But, after the Norman conquest, the changes which have been mentioned in the state of the country, contributed to produce farther alterations in the judicial establishments; and particularly, to divest more entirely the public assembly of the ordinary cognizance of lawsuits. By the completion of the feudal system in France, the administration of justice in that

country attained a degree of regularity which was formerly unknown; and upon the accession of William the first, to the English throne, the improvements in this branch of policy, which had been extended to Normandy, at that time a part of the French dominions, were gradually introduced into Britain. As the several districts of the kingdom, which had formerly been distracted by the feuds of their independent leaders, came now to be united under the feudal superiority of the crown, the decision of private quarrels by the sword was more effectually restrained; while the vigour and influence, possessed by the two first princes of the Norman race, co-operated with the natural progress of society in bringing the differences among all the inhabitants under the determination of the magistrate. From the consequent multiplication of appeals to parliament, the members of that assembly became daily less disposed to execute this part of their duty; at the same time that, from the increasing authority of the crown, their attendance was rendered proportionably less necessary. The number of crown-vassals, convened on such occasions, was therefore gradually diminished;

the absence of others was more and more overlooked; and at length there was formed, out of parliament, a regular tribunal, for the sole purpose of deciding law-suits, and composed of an arbitrary number of those persons who sat in the greater assembly. The great officers of the crown, being always upon the spot, whenever a meeting of this kind was called, became its ordinary constituent members; and to these were added by the king particular persons, who, from their knowledge of law, or experience in business, were thought qualified to assist in the inferior departments of office*.

* Account of this tribunal in Madox's History of Exchequer. The great officers of the king's court are made by this author to be seven in number. 1. The chief justicier. 2. The constable. 3. The mareschall. 4. The seneschal or dapifer. 5. The chamberlain. 6. The chancellor. 7. The treasurer. Of these the chief justicier was originally the seneschal or high-steward. But when the primitive high-steward, who had been the chief officer of the family, came to be possessed of great ministerial powers over the whole kingdom, a deputy was appointed to manage the affairs of the household, who acquiring high rank and authority, received the appellation of seneschal, or *steward of the household*, as the other was called the *steward of the kingdom*. The subordinate appointment of a steward of

This court, from the place in which it was commonly held, received the appellation of the *aula regis*. In its constitution and origin, it corresponded exactly with the *cour de roy*, which, after the accession of Hugh Capet, was gradually formed out of the ancient parliament of France; and with the *aulic council*, which, after the time of Otho the Great, arose, in like manner, out of the diet of the German

the household, or *comes palatii*, is also to be found in France, Germany, and other feudal countries.

The office of constable, or chief groom, had come in England, as well as upon the continent, to be divided into two branches, that of the constable and marshal; or of the groom and the smith, or farrier.

The seneschal and dapifer ought, in all probability, to have been distinguished; as in France, and of course in Normandy, the offices of steward, and butler, or cup-bearer, had been long separated.

The treasurer is supposed to have been originally the deputy of the high-steward.—But in later times was more probably that of the chamberlain, who came to have the principal charge of the revenue.

See an account of the rank and employment of these officers, in that branch of the king's court which had the management of the revenue, in the *Dialogus de Scacario*, published by Madox, from the *black* and the *red books of Exchequer*.

empire. In Scotland we meet with a court of the same nature; and there is reason to believe that, in every European kingdom of considerable extent, the progress of the feudal system gave rise to a similar institution. In all these countries, as well as in England, it appears probable, that this tribunal was detached from the national council by connivance rather than by any positive appointment; from a disposition in the people to consult their own ease and conveniency, more than from any design upon the part of the crown to limit their privileges; in short, from no preconceived plan of altering the constitution, but from a natural and obvious accommodation to the circumstances of the community; and from an immediate prospect of advantage, by facilitating the distribution of justice. As this tribunal, therefore, has been formed in a slow and gradual manner, it seems difficult, in any of the countries above-mentioned, to ascertain the precise date of its formation. In England, the institution of the *aula regis* is commonly ascribed to William the Conqueror; but this must be understood with relation to the first appearance of that court, as distinct from the

greater meeting of parliament, and not with respect to the subsequent variations and improvements which preceded its complete establishment.

This court was held by the English monarchs, not only in their most usual place of residence, but wherever they happened to be, when there was found occasion for its interposition. It had the same extent of jurisdiction with parliament, out of which it had grown; and therefore obtained the cognizance of all ordinary law-suits, whether civil, criminal, or fiscal.

The king himself presided in the *aula regis*, whenever he thought proper to sit there as a judge; but the ordinary president of this court was the lord high steward, the principal officer of the crown; who, in rank and authority, had risen to be the second person in the kingdom; and upon whom the king, when absent from parliament, had likewise devolved the right of presiding in that assembly*.

* When the members of this court transacted civil and criminal pleas, they sat in the hall of the king: when they acted as a court of revenue, they sat in the Exchequer. Dial. de Scacario. Baron Gilbert's Hist. of Chancery.

For some time after this tribunal had been separated from the meetings of parliament, it still consisted of all the great officers of the crown; but according as, by the gradual extension of its authority, it had occasion to sit more frequently, the attendance even of the greater part of these members was rendered more useless, as well as inconvenient; and therefore became the less regular. The king, at the same time, acquiring higher notions of his own dignity, or finding himself more engaged in the other departments of government, ceased also to exercise the ordinary functions of a judge; so that the high steward became in a manner the sole magistrate of the *aula regis;* and, from this most conspicuous branch of power annexed to his office, was denominated the *grand justiciary**.

* That the grand justiciary of England was originally the high steward, appears indisputable. 1. That the high steward, or *maire of the palace*, in France, was anciently the officer of the crown who acquired the highest dignity and authority over the kingdom, is universally admitted. 2. In Normandy a similar officer, appointed by the duke, appears to have been chief justiciar throughout the duchy. See Coustumier du Normandie. 3. From the black and

While the judicial authority of parliament was thus delegated to another court, the king exercised the chief parts of the executive power, by the assistance of a *privy-council*, composed

red books of Exchequer, there is distinct evidence that Robert earl of Leicester, who, in the reign of Henry the Second, was the high steward, had also the office of *grand justiciary*. *Non solum ad scacarium verum per universum regnum* PRESIDENTIS *dignitatem obtinuit.* The author of this account was a cotemporary, who says he saw the great officer whom he speaks of. 4. That the high steward had by his office the right of presiding over the king's privy counsellors, and over all the officers and ministers of justice in the kingdom, appears also from an old manuscript, intitled, *Quis sit Seneschallus Angliæ, et quid ejus officum*, quoted by Sir Robert Cotton and other antiquaries, whose researches upon this subject are preserved in Hearne's Collection.—See the facts collected by these authors—also Spelm. Gloss. v. Justiciarius Capitalis.

It is true, that among the English historians and antiquaries there is some confusion in the accounts given of the persons who held the office of high steward and of justiciary. This seems to have arisen partly from the difficulty of distinguishing the old high steward from his original deputy the steward of the household; and partly from the occasional appointments made by the sovereign of persons to preside in particular trials, who have been mistaken for permanent justiciaries. This last seems to be the great source of error in Madox.

of such barons as enjoyed his particular favour and confidence. Some institution of this nature had probably existed, at least occasionally, during the reigns of the later Saxon princes; but, after the Norman conquest, when the prerogative was considerably exalted, the privy-council, of consequence, rose in dignity, and its interpositions became proportionably more extensive. The members of this meeting, it is probable, were nearly the same persons who, from their employment about the king's person, had usually been called to sit in the *aula regis*, after it came to be separated from the greater meeting of parliament; and even when the king and his privy-counsellors had devolved the ordinary business of that court upon a single magistrate, they still retained the cognizance of such extroradinary causes, both civil and criminal, as more immediately excited their attention. Of the causes which came, in this manner to be determined by the king and his

5. That the high steward was anciently the president over the king's judges, and even of the high court of parliament, is further confirmed by the privilege of that officer, when created, in later times, to preside in the house of lords.

privy-council, and were at length, by custom, appropriated to that court, there were three different sorts.

1. When a crime was committed, for the punishment of which the common law had made no proper provision, it was thought expedient, that the criminal should not be permitted to escape from justice; but that he should be called before this extraordinary tribunal, and punished according to the nature of his offence. From the meetings of the privy council, which gave a decision in such uncommon and singular cases, there was formed, in after times, a regular jurisdiction, known by the name of the *star chamber**.

From the nature of things, it was to be expected, that this jurisdiction would soon degenerate into tyranny and oppression. The procedure of the court, as it related to matters

* Concerning the origin of the name of star-chamber, and the original nature of that court, see Sir Thomas Smith de Repub. Angl.—Lamb. Arch.—Blackstone's Comment. —The nature of the jurisdiction anciently possessed by the star-chamber, may be conceived from the sort of offences concerning which that court is directed to enquire, by the statutes 3 Henry VII. c. 1. and 21 Henry VIII. c. 20. See Coke's Inst.

in which no rule had been established, was, of course, discretionary and fluctuating: at the same time that the causes which might come before it, under pretence of not being properly regulated by common law, were capable of being multiplied without end; not to mention, that, as the members of this court were created and removed at pleasure by the king, so the decisions, whenever he chose to interfere, depended entirely upon his will. These objections, however, to the jurisdiction of the star-chamber, which appear so well founded, and which, in a future period, occasioned the abolition of that court, were not likely to be suggested upon its first establishment, when its interpositions, we may suppose, were few, and limited to cases of great necessity, and when the simplicity of the age was more disposed to regard the immediate benefit arising from any measure, than to consider the distant consequences of which, as a matter of precedent, it might possibly be productive.

2. In civil questions, the rules of common law, which had been gradually established by judges in order to avoid reflections, and to prevent inconsistency of conduct, were sometimes

found so extremely defective as to lay the court under the disagreeable necessity, either of refusing justice to individuals, or of pronouncing an improper decision. The king and his privy-council, upon the same principle which led them to interfere in extraordinary crimes, were induced to hear the complaints of persons who had suffered injustice from the rude and imperfect system of jurisprudence adopted by the grand justiciary; and to afford them relief by a decision according to conscience or natural equity. The interpositions derived from this source, becoming numerous, and being often attended with some difficulty, were put more immediately under the direction of the chancellor; who, as the king's secretary, was usually a man of some literature; and who, having become the clerk, or keeper of the records of the *aula regis*, was particularly conversant in matters of law, and qualified to decide in such nice and intricate cases. In what manner the decisions of this officer, who acted at first with the assistance of a committee of privy-counsellors, gave rise to the jurisdiction of the *court of chancery*, will fall more properly to be considered hereafter.

3. When the Christian clergy had acquired an extensive authority and jurisdiction in the western part of Europe, we find that, whatever censure they may deserve for the interested policy which they practised in other respects, they had the singular merit of endeavouring every where to repress the disorder and injustice arising from the anarchy of the feudal times. The weak and defenceless, who met with insult and oppression from every other quarter, found protection from the church; and the causes of widows and orphans, and of all persons in circumstances of distress*, which had been banished from the barbarous tribunal of the lay-judges, procured a welcome reception in the spiritual court; where they were commonly examined with candour, and determined with impartiality.

In imitation, as it should seem, of this ecclesiastical interposition, the king of England took under his immediate protection the causes of such as, by reason of their poverty, were unable to bear the expense of an ordinary law-suit; and, since no other court in the country

* *Personæ miserabiles.*

could give the proper redress, he encouraged those persons to bring a petition or supplication to the privy-council; which decided their claims in a summary manner, and without the forms observed in the ordinary tribunals. Hence particular persons being entrusted with this branch of business, composed at length a *court of requests*, as it was called; which, for a long time, had no warrant of ordinary jurisdiction; but which, as the complaints that came before it could not be accurately defined, assumed at length so great powers as to render it unpopular, and, in the reign of Charles the first, to occasion its abolition*.

The influence of that humanity, displayed by the church, was not confined to England; but appears to have produced a similar interposition in the government of other European countries. In France it was anciently the custom to present petitions or complaints to the king at the gate of his palace; and, for the purpose of receiving and examining these, the king was early led to appoint certain persons belonging to his household. If any petition

* Sir Tho. Smith de Repub. Anglor.—Blackstone's Comment.

was of too great consequence to be answered immediately by these commissioners, they were directed to make a report of it to the king, and to require the attendance of the parties, in order that the cause might be heard and determined. The persons appointed for the determination of such causes, who seem to have been members of the king's privy-council, were called *maistres des requestes de l'hostel du roy*. Their number was increased to six, of which the one half were ecclesiastics; and they seem at length to have been formed into a separate court, under the name of the *chamber of requests**.

The institution of the *aula regis*, or court of the grand justiciary, was a natural, and a very great improvement in the system of judicial policy. The great national council could not be very frequently convened, and its decisions, therefore, especially in matters of private property, were not easily procured. But the smaller tribunal of the *aula regis* was easily kept in readiness, to determine every controversy whether civil or criminal. As the king, amid the disorders of the feudal government, was under the necessity of making frequent

* Recherches de la France. D'Estienne Pasquier.

journies over the kingdom, in order to maintain his authority, and to suppress or prevent insurrections, he was enabled to receive, in every quarter, the complaints of his people, and found no difficulty in calling this court to give such redress as the occasion might require. Justice was made, in this manner, to pervade the country; reparation of injuries was rendered more certain, while the expence of litigation was diminished; and, by punishing crimes in the neighbourhood of those places where they had been committed, the axe and the halter became an immediate and powerful antidote to the poison of bad example.

From the decisions of this tribunal, there always lay an appeal to the high court of parliament. This was a consequence of the manner in which the *aula regis* was formed; by the mere disuse of attendance in the greater part of the members of parliament; who thence were understood to have delegated the ordinary judicial power to such of their number as continued in the exercise of it. But as this delegation was intended merely to save trouble to the members of parliament, it was not conceived to exclude a full meeting of that council from reviewing, in extraordinary cases the proce-

dure of the committee upon whom this ordinary jurisdiction had been devolved. Though parliament might wish to be disengaged from the labour attending the decision of law-suits, it was probably not willing to resign the authority connected with that employment; and, while it acquiesced in substitution of a court for excising the whole parliamentary jurisdiction in the first instance, it still reserved the power, which might be exerted on singular occasions, of superintending the proceedings of that court, and of controlling its decisions.

The *aula regis*, being a sort of deputation from the national council, or king's baron-court, had, on the other hand, a power of reviewing the sentences of the several tribunals erected in different parts of the kingdom; and became an intermediate court between them and the high court of parliament. There was the same reason for committing to the court of the grand justiciary, the province of hearing and discussing appeals from inferior tribunals, as for devolving upon it an original jurisdiction in parliamentary actions. The full establishment of this tribunal, however, together with the changes in the state of property after

the Norman conquest, contributed to limit the authority of these inferior courts, and to render their interposition of little importance.

When the great lords of a county had became vassals of the crown, they claimed the privilege of bringing their law-suits, in the first instance, before the baron-court of the sovereign, their immediate superior. To the same court were brought immediately, appeals from the sentences pronounced by these great lords in their own baron-courts. The sheriff, now converted into a crown vassal, beside the jurisdiction over his own feudal barony, appears to have still retained the power of deciding controversies between the *rear-vassals* or tenants belonging to different baronies within his county.

But the authority possessed by the *aula regis*, which was daily extended, from the increasing power of the crown, enabled that court even to make continual encroachments upon the subordinate jurisdiction of the sheriff and of the different barons. It could be of little advantage to the inhabitants, that their law-suits were brought in the first instance before the court of the baron or of the sheriff, since the

decision of those judges might, with the utmost facility, be reviewed by the court of the grand justiciary; and, as this great tribunal appeared occasionally in all parts of the kingdom, and distributed justice with superior efficacy and splendor, men were frequently disposed to pass over the inferior courts, and took encouragement to bring their disputes immediately before the court of appeal. Thus, by the gradual operation of the same circumstances, the judicatories of each barony, and county, dwindled into a state of insignificance; their jurisdiction was at length restricted to matters of small value; and the greater part of causes, civil and criminal, as well as fiscal, were appropriated to the ordinary baron-court of the sovereign.

Mr. Hume imagines, that none of the other feudal governments in Europe had such institutions as the county-courts; and seems to be of opinion, that as these courts, by requiring the frequent attendance of the barons, contributed to remind them of their dependence upon the king, they must have had remarkable effects in reducing those great personages under the authority of the chief magistrate.

But the county-courts were so far from being peculiar to England, that they appear in the early periods of the feudal system, to have existed throughout all the western parts of Europe. In France, and in several other countries upon the continent, those courts began sooner to lose their authority than in England; because the sovereign had sooner acquired a feudal superiority over the great lords; by which they were reduced under the immediate jurisdiction of the king's baron-court, and withdrawn from that of the chief officer of a county. In Scotand, on the other hand, where the influence of the crown over the nobles advanced more slowly than in England, the county-courts were enabled much longer to preserve their primitive jurisdiction; so that a considerable share of it has been transmitted to the present time, and become a permanent branch of the judicial polity.

It seems difficult, therefore, to suppose that the long continuance of the courts of the sheriff in England had any tendency to increase or maintain the authority of the king over the barons. The decay of those judicial

establishments appears, on the contrary, to have been a necessary consequence of a correspondent exaltation of the crown; and we shall find that, in every country, they remained longer in power and splendor, according as particular circumstances contributed to thwart the ambitious views of the monarch, and to prevent the extension of his prerogative.

In the dominions belonging to France the judicial power of the *cour de roy* advanced very quickly from the reign of Hugh Capet, by the disuse of the county courts, and by receiving appeals from the courts of the barons. These appeals, agreeable to the general custom of the feudal governments, contained at first a complaint that injustice had been committed by the inferior judge, who, therefore, was obliged to appear as a party, before the superior tribunal. But according as the practice of appealing became more frequent, the petitions of appeal were admitted upon slighter grounds; the charge of wilful injustice against the inferior courts was more and more overlooked; the magistrates who had presided in these courts, were no longer sufficiently interested to appear for the justification of their conduct;

and the controversy was examined in the court of review, for the sole purpose of determining the propriety or impropriety of the former decision.

It is true, that from the disorders which prevailed in France, under the later princes of the Carlovingian race, one or two of the great lords had acquired such independence, as, for some time after the reign of Hugh Capet, prevented the king from reviewing their sentences; but this is mentioned by all the historians as a remarkable singularity. It also merits attention, that the French monarchs, about this period, were not content with the power of receiving appeals from the several courts of their barons. An expedient was devised of sending royal bailiffs into different parts of the kingdom, with a commission to take cognizance of all those causes in which the sovereign was interested, and in reality for the purpose of abridging and limiting the subordinate jurisdiction of the neighbouring feudal superiors. By an edict of Philip Augustus, in the year 1190, those bailiffs were appointed in all the principal towns of the kingdom*.

* Hainault's Abridgment of Hist. of France.

CHAPTER IV

Progress of ecclesiastical Jurisdiction and Authority.

THE hierarchy of the western church grew up and extended itself over the kingdoms of Europe, independent of the boundaries which had been set to the dominion of secular princes, and of the revolutions which took place in the state of any civil government. The Roman pontiff, having found the means of uniting under his protection the clergy of each particular kingdom, was equally interested in promoting their influence, as they were in maintaining the authority of their spiritual leader. By taking advantage, therefore, of the various and successive contentions among opposite and rival powers, he was enabled to extort concessions from those whom he had supported, to levy impositions, and to exalt the dignity and prerogatives of the holy see.

The Norman conquest, in England, was followed by a complete separation of the

ecclesiastical from the temporal courts. By a regulation of William the Conqueror, the bishop was no longer permitted to sit as a judge in the court of the county, nor the rural dean in that of the hundred*. This alteration had undoubtedly a tendency to promote that exclusive jurisdiction which the clergy were desirous of establishing; and to build up that system of church power which the wisdom of after ages found it so necessary, and at the same time so difficult, to pull down. Under the dominion of the Anglo-Saxon princes, while the spiritual judges were associated with the civil magistrate, many causes of an ecclesiastical nature were brought under the cognizance of the temporal courts; and though, from the superior knowledge and address of churchmen, the decisions given by those tribunals might be apt, in some cases, to favour of a clerical spirit, there was little danger, from this arrangement, that the church would become totally independent of the state. But from the moment that the clergy were excluded from a voice in the courts of the

* William the Conqueror's charter, with advice of the national council. Spelman.

hundred and of the county, ecclesiastical controversies were appropriated, in all cases, to the judicatories of the church; and the ambition of churchmen immediately excited them to extend their own peculiar jurisdiction, by invading that of the civil magistrate.

The encroachments made by the spiritual, upon the province of the temporal courts, were of a similar nature in England, and in all the other countries belonging to the Western church. The pretence for these encroachments was, the privilege of the clergy to inflict censure upon every irregularity, which could be considered as a *sin*, or an offence in the sight of God. Under this description, every act of injustice, every violation of the laws of the land, was manifestly included; but the offences which in this view attracted more particularly the attention of churchmen were such, it may easily be conceived, as had an immediate connexion with their own interest, or with those religious observances from which their own dignity and importance were in some measure derived.

One of the first interpositions of the church, in a matter of civil jurisdiction, appears to

have been made with relation to *tythes*, and other ecclesiastical revenues. Even after the rights of the clergy, in this particular, had received the sanction of public authority, they were not likely to meet with a vigorous and hearty support from the civil magistrate; and it was therefore considered by the church, as a matter of general concern, to render them effectual in the spiritual court.

The performance of testamentary bequests was viewed in a similar light. As in the exercise of their profession, the clergy were frequently employed about dying persons, and had almost the exclusive possession of all the literature of that ignorant age, they were usually consulted upon the making of testaments, and became the common witnesses to those deeds. It would be doing them injustice to say, that they neglected to avail themselves of that situation, for increasing the revenue of the respective corporations to which they belonged. With so great diligence and success did they perform this part of their duty, that few persons adventured to take a near prospect of a future state, without making considerable donations for *pious uses;* and the effect of in-

culcating the same doctrine, was at length rendered so universal, that, in many countries of Europe, a great proportion of every personal estate was, without any testament, and in virtue of a tacit or presumed will of the proprietor, transferred, by the ordinary course of succession, to the church. Thus the clergy were not only the best qualified for explaining the will of the testator, but had besides a peculiar interest in the execution of it; and therefore, by their activity and vigilance, joined to the indifference and remissness of the civil tribunals, they found it not difficult, in questions of this nature, to acquire an exclusive jurisdiction.

From the same principle which recommended penances and mortifications as highly meritorious, the ministers of religion thought it incumbent upon them to censure and discourage all excesses in sensual pleasure; and in a particular manner to restrain every irregularity with respect to the intercourse of the sexes. The contract of marriage was therefore brought under their immediate inspection; and, as it came to be celebrated by a clergyman, and to be accompanied with religious forms and solemnities, was regarded as

a species of sacrament. Upon this account, every breach of the duties of marriage, every question with relation to its validity, or concerning the terms and conditions which were held compatible with that institution, became an object of ecclesiastical cognizance.

This branch of jurisdiction afforded, by degrees, a pecuniary revenue, which the clergy did not fail to improve. By the Roman law, which was at first adopted in ecclesiastical courts, marriage was prohibited between collateral relations in the second degree; that is, between brothers and sisters. This prohibition, comprehending those persons who usually were brought up in the same family, and who, unless their union had been entirely prevented, might be frequently exposed to the hazard of seduction, is founded upon manifest considerations of expediency. But no sooner was the church possessed of sufficient authority in this point, than, becoming dissatisfied with such a reasonable and salutary regulation, she thought proper to introduce a stricter discipline; and proceeded, by degrees, to prohibit the union of more distant relations; in so much that marriage between persons in the fourteenth

degree, according to the Roman computation, was at length declared illegal*. Not contented with preventing the intercourse of natural relations, the superstition of the age recommended, and the interested policy of the church ordained, a restraint of the same nature, in consequence of the spiritual connexion arising from baptism, between the person baptized and his godfathers and godmothers, as well as the clergyman by whom that sacrament was administered; and the marriage of those persons, together with their relations, as far as the fourteenth degree, was likewise forbidden. The number of people, thus prohibited from intermarrying, came to be so immense, that persons at liberty to form that union, at a time when relations were not, as at present, scattered over the world by the influence of

* The fourteenth degree, according to the computation of the civilians, is equal to the seventh degree among the canonists; comprehending persons removed by seven generations from the common stock. To change the Roman method of counting kindred, was the first contrivance of the clergy in the dark ages, for extending the laws of ancient Rome with respect to the relations prohibited from contracting marriage.

commerce, could seldom be found, at least among persons of rank, in the same quarter of a country, and hardly ever in the same circle of acquaintance*.

These regulations were intended merely for the purpose of levying contributions from the people; for, though marriages contracted within the forbidden degrees were null and void, the church assumed a power of dispensing with the law; and to such as were able to pay for it, with exception of parents and children, and some other very near relations, a dispensation, in most cases, was readily granted.

By this jurisdiction with relation to testaments, and with relation to the validity of marriage, the church decided the most important questions concerning the transmission

* Blackstone in his Comment. vol. ii. calculates the number of relations which may, at an average, exist in different degrees of consanguinity; by which it appears, that every person may have at least 16,000, in the 14th degree, according to the Roman computation, not to mention such as are a step or two nearer, who may be living at the same time; and of *spiritual relations*, in consequence of baptism, he may have three or four times as many more.

of property. She possessed the sole power of determining the legitimacy of children, upon which depended their capacity of inheritance; at the same time that she gave authority to the nomination of every person who succeeded to an estate by the *will* of the proprietor.

Amid the disorders which prevailed in Europe for many centuries after the downfal of the Roman Empire, and by which the inhabitants were sunk in profound ignorance and barbarism, the clergy exerted themselves in restraining the perfidy and injustice of the times; and, by the influence of religious motives, endeavoured, as far as possible, to induce mankind to the observance of good faith in their various transactions. For this purpose they introduced a general practice, that contracts of every sort should be confirmed by the sanction of an oath; by which means the violation of a contract, being considered as the breach of a religious duty, fell under the cognizance of the church. From the strictness observed in the decisions of the spiritual court, the private party, at the same time, found it more advisable to bring his complaint before this tribunal than that of the civil magistrate,

The extent of jurisdiction, acquired in this manner may easily be conceived.

Lastly. To the church courts were appropriated, as I formerly had occasion to observe, the causes of widows and orphans, and of all persons in circumstances of distress. Causes of this description were too apt to be neglected by those military barons invested with civil jurisdiction, who paid but little attention to the claims of any person from whose future services they could derive no benefit, or from whose resentment they had nothing to fear.

It must be remembered, to the honour of the clergy of those times, that they were the friends of order and regular government; that, if they laboured to rear a system of ecclesiastical despotism, their authority was generally employed in maintaining the rules of justice; and that they discovered a uniform inclination to protect the weak and defenceless, against that violence and oppression which was too much countenanced by such of the laity as were possessed of opulence and power. From this circumstance, the extensions of ecclesiastical jurisdiction were highly acceptable to the people; and, notwithstanding the pernicious

consequences which they ultimately tended to produce, were, in the mean time, of great advantage to the lower ranks of men, if not of general benefit to the community.

Having thus occasion to determine a multitude of causes, both of an ecclesiastical nature, and such as fell within the province of the civil magistrate, the church courts advanced in the knowledge and experience of judicial business. As, by their literature, the clergy could not fail to be acquainted with the ancient Roman law, they were led, in many cases, to adopt the rules of that equitable system: Their own decisions were collected, in order to serve as precedents in future questions; and from these, together with the opinions of learned fathers in the church, the decrees of councils, and regulations of popes, was at length formed that body of canon-law, which obtained universal reputation in the western part of Europe.

It would have been to little purpose, however, for the church to assume a jurisdiction, had she not been able to render herself independent in the exercise of it. But the same vigour and dexterity, by which the clergy established their power in any European king-

dom, were exerted in order to withdraw their subjection from the sovereign, and to render them subordinate only to the Roman pontiff. In England this was, in some measure, effected so early as the reign of William the conqueror, by the expedient of appointing papal legates, or commissioners, to hear and determine ecclesiastical causes. As those appointments might be renewed at pleasure, they soon opened the way for a direct appeal from the English church-courts to that of Rome; which was first attempted in the reign of William Rufus, and finally accomplished in that of king Stephen*.

The entire exemption of churchmen, or *clerks*, from secular jurisdiction, which had been early introduced in some other European countries, and which appears to be a natural consequence of the advancement of ecclesiastical power, was, in England, made effectual about the time of Henry the second. The effects of this exemption, which have, in some measure, been retained in later ages, are universally known by what is called the *benefit of*

* Burne's Ecclesiastical Law.

clergy. As the church-courts never inflicted a capital or corporal punishment, those offenders, who could be subjected to no other jurisdiction, were of course exempted from such punishment, unless in some few cases, where the church might refuse her interposition, or was pleased to deliver over the criminal to the secular arm. After the reformation, this privilege of clerks, which, by the progress of literature, came to be within the reach of almost all the inhabitants, was looked upon as a convenient method for moderating the rigorous punishments of the common law; and therefore, with various modifications by statute, was then incorporated in the legal system.

In the reign of Henry the first, the monastic rule of celibacy, after long and violent struggles, was at length imposed upon the secular clergy of England; and received the sanction of ecclesiastical authority*. By this regulation, churchmen, being freed from the cares of a family, and from the burden of making a provision for posterity, were detached, in a great measure, from the rest of the community, and, by motives of interest and ambition,

* Lyttelton's Hist. of Henry II.

were more uniformly and firmly united in that ecclesiastical corporation of which they were members. Though it may be true, therefore, that this absurd system of mortification was introduced from perverted notions of refinement, and by the universal influence of superstition, there can be no doubt that it was afterwards promoted and extended from the interested policy of churchmen, and more especially from that of their spiritual sovereign.

But the great circumstance which contributed to establish the independent power of the church, was the privilege of bestowing ecclesiastical preferments.

Upon the first establishment of ecclesiastical benefices, by the donation of dying persons, and the consequent rise of ecclesiastical dignities, the inferior clergy of each diocese were chosen by the bishop and chapter, and the bishop himself, by the dean and chapter of the cathedral church. After the modern European kingdoms had been erected upon the ruins of the ancient Roman Empire, the sovereign, in each of those kingdoms, was tempted to interfere in ecclesiastical elections, and, by his influence over those who had the power of nomination,

acquired at length the privilege of bestowing the higher church livings. But when the authority of the bishop of Rome had risen to a great height in the western church, he left no measure unattempted, in order to wrest out of the hands of princes an instrument of so much importance as the nomination of the superior clergy. The dispute concerning this point, which lasted for more than a century and a half, is one of the most remarkable events in the history of modern Europe. It was begun by the famous Gregory the seventh; a man who, by his abilities, his intrepidity, and his unbounded ambition, was qualified to draw the utmost advantage from the situation in which he was placed. This pontiff not only rejected with disdain the prerogative which the German emperors had for some time exercised, of confirming the election of the popes, but prohibited them from interfering in the election of all bishops and abbots; and proceeded so far as to issue decrees, by which he excluded the laity, of every rank or condition, from the collation to ecclesiastical benefices. Henry the fourth, who at this time wore the imperial diadem, defended his rights with vigour; and,

as many princes were, by various motives, induced to support the interest of the church, the contending parties had recourse to arms. During the progress of the quarrel, all Italy and Germany were thrown into convulsions; millions of people were destroyed upon the one side and the other; and it is computed that no less than sixty battles were fought in the reign of this emperor; together with eighteen more in that of his son and successor, Henry the fifth, who at length was persuaded to conclude a peace with the court of Rome, by granting an express renunciation of all his pretensions*.

The contest, with respect to the right of investitures, was not confined to Italy and Germany, but extended itself over the other countries of Europe; in which the church, for the most part, was equally successful. In France, the decrees of the pope were made effectual with less rapidity; but without violence, and even without much disturbance. In England, the right of the laity to confer ecclesiastical benefices, was first disputed in the reign of Henry the first, when Anselm, the archbishop

* Father Paul's History of Benefices.

of Canterbury, refused to consecrate the bishops nominated by the king. The controversy was continued under several of the succeeding princes; but no blood was spilt in the quarrel, farther than by the assassination of Becket, or than what might arise from the scourging of Henry the second. In this kind of warfare, the church was properly in her own element; and managed her weapons with her usual dexterity. When king John had been weakened by an unsuccessful war, and had incurred the contempt and resentment of his subjects, the pope laid hold of that opportunity to invade his prerogative; and, by thundering out against him the different orders and degrees of ecclesiastical censure, at the same time that he had the address to employ the secular arm of France to support his authority, he at length obliged the infatuated English monarch, not only to relinquish all claim to the right of investitures, but even to resign his kingdom to the church, and to hold it for the future as a feudatory of the holy see.

It could hardly be expected that the pope would engage in such long and violent struggles for the sake merely of the clergy over

whom he presided, and that when he had at last gained a complete victory, he would not endeavour to improve it to his own advantage. No sooner was the nomination of bishops and abbots placed in the clergy of each cathedral church or monastery, than his holiness began to interfere in elections, by recommending particular persons to vacant benefices. Considering the influence and authority which he possessed over all the members of the church, and the exertions which he had made in procuring the right of election to the clergy, such a recommendation could not, with decency, be overlooked; and, in most cases, could scarcely fail of success. The frequency, however, of these recommendations disposed the electors to anticipate them on particular occasions, by filling up the vacancy with the utmost expedition. Foreseeing the death of some particular incumbent, the pope endeavoured sometimes to prevent a precipitate supply of the vacancy, by requesting that it should be delayed for some time. Such recommendations and requests, having come at length to be frequently disregarded, were afterwards accompanied with commands; and commissioners

were sent to put them in execution, as well as to punish the clergy, in case of their disobedience. To all these expedients was added, at length, a more effectual interposition for preventing every disappointment. With regard to the mode of electing bishops and abbots, and the qualifications of the person to be elected, a set of regulations was made, so numerous and intricate, that the strict observance of them became impossible; while it was declared, that, upon the least failure in any point, the election should be void, and the nomination should devolve to the apostolic see. By these artifices the bishop of Rome acquired, in reality, the power of appointing all the dignified clergy, together with all that influence and revenue which could be obtained, either directly or indirectly, from the disposal of every important ecclesiastical preferment.

CHAPTER V.

General View of the kingly Power, from the Reign of Edward I. to that of Henry VII.

THE period of the English monarchy, from Edward the First to the accession of the house of Tudor, corresponds, with great exactness, to that of the French, from Philip the Fair to Lewis the Eleventh. About the beginning of these periods, the government, in each of those countries, assumed a degree of regularity unknown in former ages; and it afterwards continued, by similar steps, advancing towards maturity. The power of the king, and that of the nobles, formed, at this time, the only balance in the constitution; which came, in the natural course of things, to lean more and more to the side of the former. The nobility were too much divided among themselves, to be capable of prosecuting any regular plan for the aggrandisement of their own order. Their opulence, which, if collected in one great current, might have borne

down every obstacle before it, was deprived of its efficacy by being broken into many separate channels, and spent in various contrary directions. In order to make an effectual opposition to the crown, it was requisite that the greater barons should be firmly united in defence of their privileges; but such a union was not easily procured, and, for any length of time, could hardly ever be maintained. Distracted by mutual animosity, and actuated by private jealousies, or by opposite views of interest, these restless, but short-sighted chiefs, were, without much difficulty, persuaded to abandon any joint measures; and excited to employ their force in weakening and destroying one another. What they gained, therefore, upon some occasions, by a sudden and violent effort, was afterwards thrown away, from the want of perseverance or management; and the effect of a temporary combination was more than compensated by their usual tendency to disunion and dissension. But the crown was not capable of being divided against itself. Its property, being under the disposal of a single person, was always directed, however injudicially, to the same end; and made subservient to

one political purpose; that of extending the royal prerogative. The revenue of the crown, therefore, created a degree of influence, which, was continually extending itself, and which, by its uniform operation, afforded continual opportunities for increasing that revenue. While the aristocracy was thus remaining stationary, or left in a fluctuating state, according to the impulse of casual circumstances, the monarchy, by receiving regular supplies from every quarter, was gradually rising to a greater height, and overflowing its ancient boundaries.

It must, however, be admitted, that the period of English history, now under consideration, is distinguished by many powerful efforts of the nobility to support their privileges; and that the crown did not rise to the summit of dignity and splendor which it attained in the possession of the Tudor family, without surmounting a variety of obstacles, and without being frequently checked and retarded by unfavourable occurrences.

There is even good reason to believe, that, in England, the regal authority was more limited, about the time of Edward the First,

than it was in France, during the reign of Philip the Fair. Though the English crown was considerably exalted upon the accession of William the Conqueror, yet, under the succeeding reigns, its progress was apparently more slow and gradual. The barons, by taking advantage of particular conjunctures, and, in some cases, by proceeding to such extremities as threatened an immediate revolution, obtained from the sovereign the most important concessions; and, in little more than a century and a half, no fewer than six great charters were granted, some of them repeatedly, by six different princes. By these charters the power of the crown does not, indeed, seem to have been contracted within a narrower compass than immediately after the Norman conquest; but it was undoubtedly restrained in its advancement, and prevented from rising to that height which it would otherwise have attained. In France, on the other hand, the extension of the royal prerogative appears, from the time of Hugh Capet, to have scarcely met with any opposition. No formidable combination of the nobles, to withstand the incroachments of the kingly power! No series of char-

ters, as in England, relinquishing the supposed usurpations of the crown, and confirming the privileges of the aristocracy! The only deed of this nature, which we meet with in the French history, was near half a century posterior to the reign of Philip the Fair; and was extorted from king John in consequence of the difficulties under which he laboured from the invasion of his kingdom by the English monarch *.

To what causes may we ascribe this diffe-

* The opportunity of the states general, assembled in "the year 1355," says the count de Boulainvilliers, "is "favourable to my design; since, upon their remonstrances, "king John gave a declaration which irrevocably esta- "blished the right of those assemblies, and which, upon "that account, might justly be compared to the *great* "*charter* granted to the *English* by a prince of the same "name; were it not unfortunately too true, that it has "been buried in oblivion for above two hundred years past, "even so far that there is no public instrument of it re- "maining, except one copy preserved in the king's library; "from whence I took that of which I shall give you an "extract in the course of this letter." [Boulainv. account of the ancient Parliaments of France.] See a full account given by this noble author, of that famous *French charter*, which in reality has a great resemblance to the *English charter* above mentioned.

rent spirit of the French from that of the English nobility? From what circumstances were the former disposed to look with so much tranquillity and indifference upon the exaltation of the crown, as never, but upon one occasion, to exert themselves in repressing it; while the latter discovered such a constant jealousy of the sovereign, and made so many and such vigorous attempts to restrain the progress of his authority? The importance of this question is obvious; for the efforts then made to resist the usurpations of the crown, may be regarded as the groundwork of those more precise limitations of the prerogative, which have been introduced in a later period.

1. There occurs one remarkable difference between the situation of the French and the English kings; that in France, the crown was, without interruption, transmitted directly from father to son, during a period of more than three hundred years; that is, from the time of Hugh Capet to that of Philip the Long; including a series of eleven different reigns; whereas in England, during the same period, we meet with no less than five deviations from the lineal course of succession; and about one

half of the reigning princes, who, however their title might be recognized by parliament, or their pretensions might be supported by the prevailing party, were, according to the common notions of that age, considered in the light of usurpers. In France, therefore, the crown passed, with perfect tranquillity, from one sovereign to another; and each of those princes, when he mounted the throne, having no competitor to obstruct his immediate possession, no flaw in his title to weaken or disturb the general pepossession in his favour, succeeded, of consequence, to all that hereditary influence which had been accumulated by his predecessors. To render the succession still more secure, Hugh Capet introduced the precaution, which had been in some measure suggested by the Roman emperors, of crowning his heir in his own lifetime; and the same practice was uniformly observed by six of the succeeding monarchs; that is, till the reign of Philip Augustus, when, from the superior stability of the throne, any ceremony of this kind was become superfluous.

In England, on the contrary, the succession of those princes, whose title was ill founded or

disputable, gave always occasion to dissatisfaction and complaint, if not to direct opposition, and open resistance; and, as the nobles were invited to lay hold of these opportunities for maintaining or extending their privileges, the king was obliged to compound for the possession of sovereignty, by submitting to limitations in the exercise of it. The personal authority of William the Conqueror, produced a submission to William Rufus, though in preference to his elder brother Robert, a man of popular character; but Henry the First, and Stephen, may be said to have purchased the crown, by the respective great charters which they granted to their vassals. With respect to Henry the Second, it must be acknowledged, that, though he was a foreigner, and though he had in some measure fought his way to the throne, yet in the end his accession was agreeable to the whole nation. But after having suffered a variety of disappointments, and having been exposed to much uneasiness from the unnatural behaviour of his own children, he appears to have confirmed the two preceding charters, from a disposition to guard against any future accident, by securing the good-will of his

people. The usurpation of John, accompanied with the murder of the lawful heir, had excited against that prince an indignation and resentment, which his future conduct, instead of removing, tended only to confirm; and the concessions which he made to his subjects, were plainly extorted from him by the accumulation of distress and embarrassment under which he laboured. Henry the Third, though there were no objections to his title, inherited, while he was yet a minor, a civil war from his father; and afterwards, by his imbecility and imprudence, was involved in calamities, from which nothing less than the good fortune, and the great abilities, of his son Edward the First could have extricated him. The charters granted by the former of those two princes were evidently the fruit of these difficulties.*

2. Another circumstance which, in that early period, produced a peculiar exaltation of the monarchy in France, was the forfeiture of Normandy by the king of England, and the reduction of that extensive country into an

* It appears, that one of the charters granted by Henry III. was subscribed by his son Edward. Blackstone, History of the Great Charters.

immediate fief of the French crown. This forfeiture, though the particular time when it happened might be accidental, was to be expected from the situation of that country, with respect to the king of England, the immediate superior, and to the king of France, the lord paramount. The effect of so great an accession of revenue and influence to the French crown was visible; and Philip Augustus, in whose reign it happened, became evidently possessed of much more authority than his predecessors.

No acquisition of equal importance was made to the crown of England at this early period; for the settlement which was effected in Ireland, by Henry the Second, and which the historians have been pleased to dignify with the splendid appellation of a conquest, was productive neither of wealth nor of authority to the English monarch; nor does it appear, for several centuries, to have yielded any advantage whatever.

3. The insular situation of Britain may be considered as a general cause of the slower advancement of the royal prerogative in Eng-

land, than is to be found in the greater part of the modern kingdoms upon the continent of Europe. As, in the infancy of government, the kingly office arose from the necessity of having a general to command the united forces of the state, it was to be expected, that the oftener any sovereign had occasion to act in this capacity, his authority, and dignity would sooner arrive at maturity. During the time of a military enterprize, when the national forces, the great body of the people, were placed under the immediate direction of the king, they acquired habits of submitting to his orders; their admiration was excited by his high station or distinguished prowess; and they were taught by experience to look up to him as the principal source of honours and preferment. In times of peace, on the contrary, when the members of different baronies, or tribes, had retired to their several places of abode, they were, in a great measure, withdrawn from the influence of the king, and were accustomed to no other jurisdiction or authority but that of the baron or chief by whom they were protected. Even after the

feudal governments had attained some degree of regularity, and when the sovereign had acquired numerous branches of civil power, it still was in the field that his pre-eminence attracted superior attention, and that he had the best means of procuring popularity.

It seems reasonable to conclude, therefore, that, upon the continent of Europe, where every sovereign found his dominions surrounded by bordering nations, whom he was frequently tempted to invade, and against whom he was obliged to be constantly upon his guard, the most ample scope was afforded him for displaying those talents, and for availing himself of those situations which were best calculated for extending his authority. In England, on the other hand; a country in which there were fewer inducements to undertake a national war, and in which the military operations of the sovereign were chiefly employed in quelling the disturbances excited by his rebellious barons, or in repelling the inroads of the Scots, which were not of much more importance than the insurrection of particular

barons, he had fewer opportunities of exciting a national spirit in his favour, and consequently found it more difficult to reduce the nobility into a state of dependence.

The prosperous reign of Edward the First had undoubtedly a considerable effect in confirming and exalting the prerogative. This prince was equally distinguished by his policy in the cabinet, and by his activity, courage, and conduct in the field; at the same time that he does not appear, by any scrupulous regard to the principles of honour or justice, to have been, on any occasion, prevented from directing those talents to the pursuit of his own grandeur or emolument. By the conquest of Wales he not only gained an enlargement of dominion, but freed himself from the vexatious depredations of a troublesome neighbour. Had he lived somewhat longer, it is more than probable that he would also have completed the entire conquest of Scotland; in which case, there is good ground to believe, that the reduction of the northern and southern parts of the island into one monarchy, would have been productive of such advantages to both

countries, as might in some measure have atoned for the perfidy and injustice by which it was accomplished.

The reign of Edward the Second was no less adverse to the influence of the crown, than that of his father had been favourable to it. By the total deficiency of that prince, in vigour and military capacity, he soon lost all the acquisitions which his father had made in Scotland; and saw the independence of that kingdom completely re-established. For the internal administration of government he was equally disqualified. The nobility of that age were, with difficulty, reconciled to the dignity and pre-eminence of the sovereign; but they could not endure, that any person of inferior condition should, by the favour of the monarch, be exalted over them, and be invested with the exercise of the prerogative. The extreme facility of Edward subjected him, however, to the constant dominion of favourites, in supporting whom he excited the indignation of the nobles; and the queen, whose affections had been seduced by Mortimer, and who seems to have thought herself better entitled than any other person to govern her husband, hav-

ing joined the malcontents, the king was formally deposed by a meeting of parliament; was kept for some time in confinement; and at length barbarously murdered. The fate of this unhappy prince cannot fail to move compassion, as it proceeded from the weakness of his understanding, and even from the gentleness of his disposition, more than from ambition, or any passion for arbitrary power: while it afforded a salutary lesson to his successors, by exhibiting a striking example of the authority of parliament, to controul, and even to punish, the sovereign.

The same power of the nobles, which had deposed Edward the Second, advanced to the throne his son Edward the Third, while yet a minor. The early indications of genius, and of a martial disposition, discovered by this prince, dispelled very quickly the gloom which had for some time hung over the nation, and gave a total change to the aspect of public affairs. He soon freed himself from the direction of the queen his mother, and put to death her favourite Mortimer, with little ceremony, and without much regard to the forms of justice. His first military enterprise was

directed to the recovery of what his father had lost in Scotland, in which, from the weak and disorderly state of that country, he met with little obstruction; but he was prevented from the execution of this plan, by another object, which was thought of much greater importance, and which, during the remainder of his reign, engrossed his whole attention. This was his pretension, in right of his mother, to the crown of France; a claim which, though founded neither in justice nor expediency, was yet sufficiently plausible to palliate that love of extensive dominion, with which not only princes, but even the people in all ages and countries, have been almost constantly intoxicated. The conduct of Edward, in asserting this claim, was probably such as every monarch of spirit, in that age, must have held, and in so doing was sure of meeting with the general approbation of his subjects. As the undertaking, therefore, was crowned with unexpected and amazing success, it is no wonder that the splendid victories obtained by this king, and by his son the Black Prince, who acted so conspicuous a part in those scenes, procured them the admiration as well as the affections of the

whole English nation. While these two princes flattered the national vanity, by the prospect of conquering so great a kingdom as France, they displayed all the talents and virtues which, in those times, were supposed to enter into the composition of the most complete military character. Even at this day, when we contemplate the gallantry of the Black Prince, and the humanity and generosity with which he treated the king of France, his prisoner, we must acknowledge that they are surpassed by nothing either in ancient or modern story. Without detracting from the merit of this distinguished personage, we are led at the same time to conceive an exalted idea of the institutions and manners of *chivalry*, which in so rude a state of society, were capable, among people of the better sort, of promoting so much delicacy of sentiment, and of encouraging any individual to form such a perfect model of propriety and refinement.

In the course of his long war against France, the king obtained, more and more, an ascendant over those nobles who followed his banner, and were smitten by an universal enthusiasm to distinguish themselves in that illustrious

field of national glory. His administration at home was equally prudent and vigorous, and calculated to restrain injustice, as well as to command respect. Though not disposed to relinquish any part of his prerogative, he appears to have had a real regard for the ancient constitution; and though he acquired greater authority than was possessed by the former kings of England, he confirmed, on many occasions, the great charters of his predecessors. He was under the necessity of making large and frequent demands of money from his subjects; but, as he endeavoured, in most cases, to procure it by the concurrence of parliament, and as the nation entered heartily into the views which gave occasion to so much expence, the supplies which he required were commonly furnished without any complaint. His numerous applications to the national assembly contributed, besides, to ascertain its powers and privileges, as well as to establish and reduce into order the forms and method of its procedure.

It merits attention, that, notwithstanding the alacrity with which the English nation supported the claim of their sovereign to the

crown of France, the parliament seem to have been alarmed at the idea of their falling under the government established in that country; and, to remove this apprehension, a statute was made, in which the king expressly declares, that the realm and people of England "shall not, in any time to come, be put in "subjection nor in obeisance of us, nor of our "heirs nor successors, as kings of France, "nor be subject nor obedient, but shall be "free and quit of all manner of subjection "and obeisance aforesaid, as they were wont "to be in the time of our progenitors, kings "of England, for ever*." From this precaution, it may be inferred, that the parliament understood the French monarchy, at this time, to be more absolute than the English; and were afraid that their monarch, if he came to the possession of that kingdom, might be led to exercise over them a power inconsistent with the constitution of England.

The reign of Richard the second is, in many respects, a repetition of the same disgusting and melancholy scenes, which that of

* 14 Edw. III.

his great grandfather, Edward the second, had exhibited. In each of them we behold a young prince ascending the throne with great advantages; regarded by the nation with a partiality and affection derived from paternal connections; incurring the general contempt and indignation, by his folly and misconduct; governed, through the whole course of his administration, by favourites; dethroned at length by parliament, imprisoned, and brought to a tragical end. But the occurrences, in the time of Richard, were accompanied with circumstances which, in a review of the English government, are more particularly worthy of observation.

This reign affords a memorable example of the interference of parliament for the removal of the king's ministers. To the address which was presented for this purpose, Richard is said to have answered, that, *at the desire of parliament, he would not remove the meanest scullion of his kitchen.* Having occasion for a subsidy, however, which could not otherwise be obtained, he was obliged to comply with their demand: the earl of Suffolk, the chancellor, was not only removed from his office, but im-

peached, and found guilty of misdemeanours; an inquiry was ordered into the disposal of the public revenue; and a commission was granted by parliament to fourteen persons, for the space of a twelvemonth, to concur with the king in the administration of government.

To these regulations Richard submitted no longer than till he thought himself in a condition to oppose them; and it soon became evident, that he had formed a resolution of extending his prerogative beyond its ancient limits. For this purpose he consulted with the principal judges and lawyers of the kingdom, from whom he found no difficulty in procuring an unanimous opinion agreeable to his wishes. Whatever may be the virtue of individuals, it is not to be expected that a body of men, sprung very frequently from a low origin; bred up in the habits of a gainful profession; whose views must be continually directed towards preferment, and the emoluments of office; soldiers of fortune, and whose fortune depends chiefly upon the favour of the crown; will be disposed to stand forth in critical times, and expose themselves to much hazard in maintaining the rights of the people.

This design was frustrated by the vigour and activity of the nobles, who levied a great army, and defeated that of the crown. The king's ministers made their escape; but in their absence were impeached, and their estates confiscated. Two persons of note, one of whom was the famous Tresilian, chief justice of the king's bench, who happened to be caught, were tried and executed. The rest of the judges, who had concurred in the opinions above-mentioned, were banished to Ireland.

The behaviour of the king in this situation was abject and mean, in proportion to his former haughtiness. At an interview with the nobles, he is said to have answered their reproaches with a flood of tears. But Richard was possessed of a high degree of obstinacy; a quality which is frequently connected with inferiority of understanding: whether it be that the same stupidity which leads men into error, puts them out of the reach of conviction by reasoning; or that, in proportion as they are incapable of examining objects on every side, they are commonly self-conceited and opinionative.

The parliament being then composed of two houses, as will be mentioned more fully hereafter, it was perceived by the advisers of this infatuated prince, that the easiest method of carrying his views into execution, was by dividing that assembly, and, in particular, by procuring a majority in the house of commons. We accordingly find, that by adhering invariably to the same plan; by directing the nomination of sheriffs, and of the principal magistrates of boroughs; and by employing the interest and address of all those different officers in the election and return of representatives, this object was, in a few years, entirely accomplished. The king now ventured to avow his pretensions to absolute power; and in a meeting of parliament, in the year 1397, the opinions of the judges, which had been formerly condemned, were approved of and ratified; the chief heads of the aristocracy were put to death or banished; the duke of Glocester, the king's uncle, was privately murdered; and, to supersede the necessity of calling the national assembly for the future, a committee was appointed, consisting of twelve peers and

six commoners, upon whom the authority of both houses was devolved.

This expedient of the crown, to pack the house of commons, is the first of the kind that occurs in our history; and it must be considered as forming a remarkable æra in the British constitution. It shows, in the first place, the limited nature of our ancient government; since, notwithstanding the late advances of the regal authority, the king, in order to carry his measures, was obliged to employ such indirect means for procuring the concurrence of parliament.

It proves also, that political consideration was not, at this period, confined to the greater nobility; but that men of small property, and of inferior condition, the representatives of counties and boroughs, were possessed of so much interest as enabled them, by throwing their weight into the scale of the sovereign, to bestow upon him an entire ascendant over the national council.

From the consequences which followed this undue influence, acquired by the king over the house of commons, we may plainly perceive that a spirit of liberty, or, if you will, of

opposition to the tyranny of the crown, was even then diffused, in some measure, over the nation. Finding that he was now master of the resolutions of parliament, Richard supposed the dispute was at an end; was therefore lulled in perfect security; and abandoned himself to the dictates of his own arbitrary will. But the people saw with concern, that they had been betrayed by their own representatives; their indignation and resentment were excited; and they became ripe for a general insurrection. The leaders of the malcontents cast their eyes upon the duke of Hereford, the eldest son of the duke of Lancaster, who, by the injustice of the king, had been sent into exile, and afterwards excluded from the inheritance of his father's large possessions. This nobleman, the most distinguished by his rank and accomplishments, was invited to put himself at the head of the conspiracy, for the purpose of redressing his own private injuries, no less than of delivering the nation from tyranny and oppression. Richard, mean while, went over to Ireland, in order to quell the disturbances of that country, and thus gave to his enemies the opportunity which they wanted

of executing their designs. The general sentiments of the people were made abundantly evident by the events which followed. The duke of Hereford landed at Ravenspur, in Yorkshire, with no more than eighty attendants; but in a short time found himself at the head of an army amounting to sixty thousand. The duke of York, on the other hand, who had been left regent of the kingdom, assembled a body of troops to the number of forty thousand; but these, from disaffection, were unwilling to fight; and being therefore disbanded, they immediately joined the enemy. Another army having been transported by the king from Ireland, were infected with the same spirit, and the greater part of them deserted the royal standard.

Richard, abandoned by the whole nation, was forced to subscribe an instrument of *resignation*, in which he acknowledged himself unworthy to govern the kingdom. An accusation for misbehaviour, consisting of no less than thirty-five articles, was preferred against him to parliament, and universally approved of: after which, this prince was solemnly de-

posed by the suffrages of both houses; and the crown was conferred on the duke of Hereford.

It is remarkable, according to the observation of an eminent writer, "that these extremities fell upon Richard the second, at a "time when every thing seemed to contribute to his support, in the exercise of that "arbitrary power which he had assumed. "Those whom he had most reason to fear, "were removed, either by violent death or "banishment; and others were secured in his "interest by places, or favours at court. The "great offices of the crown, and the magistracy of the whole kingdom, were put into "such hands as were fit for his designs; be-"sides which, he had a parliament entirely "at his devotion; but all these advantageous "circumstances served only to prove, that a "prince can have no real security against the "just resentments of an injured and exas-"perated nation; for, in such governments "as that of England, all endeavours used by "the king to make himself absolute, are but "so many steps towards his own downfal*."

* Remarks upon the History of England by H. Oldcastle.

The right of Henry the fourth to the crown of England was derived from the authority of parliament, confirmed by the voice of the whole kingdom. No transaction of the kind was ever complcated with greater unanimity. But although, in that age, the people gave way to their natural feelings in dethroning an arbitrary and tyrannical prince, they were probably little accustomed to reason upon those philosophical principles, by which, in cases of extreme necessity, the right of doing so may be vindicated. Even so late as the revolution, in the year 1688, when the necessity and propriety of the settlement, which then took place, was universally understood, the parliament were unwilling to avow, in express terms, that power which they were determined to exercise; they had recourse to childish evasions, and fictitious suppositions; and the absurd pretext of an *abdication* was employed to cover the real deposition of the sovereign. It is not surprising, therefore, that, in the days of Richard the second, the speculative opinions of men, concerning points of this nature, were loose and fluctuating. Henry appears to have been sensible of this; and

founds his claim to the throne upon three different circumstances; upon the mal-administration of Richard; upon the right of conquest; and upon a popular, though probably a groundless tradition, that, by his mother, he was descended from Henry the third, by an elder brother of Edward the first, who, on account of his personal deformity, had been excluded from the succession to the crown. These particulars, however, are jumbled together, in a manner calculated to avoid a minute investigation. "In the name of Fadher, "Son, and Holy Ghost," says he, "I Henry "of Lancaster challenge this rewme of Yng-"lande, and the crown, with all membres and "appurtenances; als I that am descendit by "right line of the blode, coming fro the "gude King Henry therde, and throge that "right that God of his grace hath sent me, "with helpe of kyn, and of my friends, to "recover it; the which rewme was in poynt "to be ondone by defaut of governance, and "ondoying of the gude lawes."

As no credit seems due to this connection with Henry the third; so it must be admitted, that, supposing it necessary to set aside

Richard the second, for *defaut of governance*, Henry the fourth was not, according to the established rules of succession, the next heir of the crown. He was the grandson of Edward the third, by the duke of Lancaster, third son of that monarch. But the duke of Clarence, Edward's second son, had left a daughter, who was married into the house of Mortimer, and whose grandson, the earl of Marche, now a boy of seven years of age, was the representative of that family.

In examining this point, however, it ought to be remembered, that by the rules of succession established among rude and warlike nations, what is called the right of *representation* is unknown, and the nearer descendants of a family are frequently preferred to the more distant; as also, that, upon similar principles, female relations are usually excluded by the males. According to the early laws of almost all Europe, the title of Henry the fourth to the crown was therefore preferable, from both of these considerations, to that of the earl of Marche. A contrary custom, indeed, in consequence of more improved manners, had undoubtedly been gaining ground, before this

competition became an object of attention; but we must not suppose that it had yet become universal, or had acquired such a degree of stability, as the peaceful situation, and the scientific views of a polished age, have since bestowed upon it.

But whatever might be the opinions of parliament, or of the people, upon this point, the preference of Henry to any other competitor, was, at this time, a matter of the highest expediency, if not of absolute necessity. To dethrone a prince, who had for years been establishing a system of absolute power, and who had given proofs of his violent and sanguinary disposition, was a measure no less dangerous than it was difficult; and the successful execution of it could only be expected under a leader of great popularity, weight, and abilities. Henry appears to have been the only person in the kingdom qualified for conducting such an enterprise, and likely to secure the public tranquillity under the new establishment. To depose Richard, and at the same time to commit the reins of government to a person who, in that extraordinary exigence, was manifestly incapable of holding them,

would have been to attempt the abolition of despotism by substituting anarchy in its place; and wantonly to introduce a revolution at the hazard of much bloodshed and injustice, but with no reasonable prospect that it could be productive of any lasting advantages.

Henry the fourth enjoyed, however, but little tranquillity in the possession of that sovereign power which was thus conferred upon him. The great lords, who had taken a distinguished part in placing him on the throne, and who probably over-rated their services, became dissatisfied with that share of the royal favour and confidence which he thought proper to bestow upon them; and were disposed to believe they might easily pull down that fabric which they themselves had erected. The persevering activity, the deliberate valour, and sound policy, displayed by this monarch, through the whole of his conduct, enabled him to crush those frequent conspiracies which were formed against him; although it must be admitted, that his uncommon talents, which were uniformly exerted for this purpose, during a reign of thirteen years, were hardly sufficient to recover the prerogative

from the shock which it had received by the deposition of his predecessor.

The splendid character of Henry the fifth; his courage and magnanimity; his clemency, moderation, and humanity; his engaging appearance and deportment; his affability, address, and popular manners; together with his renewal of the claim to the kingdom of France, and his invasion of that country, accompanied with most astonishing success; these circumstances revived the flattering and delusive prospects entertained by the English in the days of Edward the third; and, by seizing the national enthusiasm, reinstated the crown in that authority and dignity which it had formerly maintained.

But the death of that monarch produced a sad reverse in the state of the kingdom. By the long minority of Henry the sixth, and his total incapacity, after he came to be of age; by the disasters which befel the English in prosecuting the war with France; and by their entire expulsion from that country, without the least hope of recovering it; the people were filled with discontent; were inspired with contempt of their sovereign; and of

course were disposed to listen to any objections against the title by which his family had obtained the crown. In the preceding reign those objections were held to be of so little moment, that Henry the fifth discovered no jealousy or apprehension of the Earl of Marche, the lineal heir of Richard; and there even subsisted between them an intercourse of mutual confidence and friendship; a circumstance which reflects great honour both upon the king and upon that nobleman. As the right of the governing family had been confirmed by a possession of three successive reigns, it would not, in all probability, have now been called in question, had not the weakness and misfortunes of the present administration destroyed all respect to the government, and excited uncommon dissatisfaction.

Upon the death of the earl of Marche without heirs male, the duke of York, in right of his mother, was now become the representative of that family; and from the extensive property possessed by this nobleman, together with his powerful connections, in consequence of various alliances among the principal nobility, he found himself in a condition to assert

that claim to the crown, which had been overruled by the prevailing ascendant of the house of Lancaster. It is needless to enter into particulars of the famous contention between those two branches of the royal family; which was continued through the reigns of Henry the sixth, of Edward the fourth, and of Richard the third; and which, during a period of about five-and-thirty years, filled the kingdom with disorder and with blood. That this long continued civil war, in which different princes were alternately set up and dethroned by the different factions, and in which all public authority was trampled under foot, was extremely unfavourable to the prerogative, will readily be admitted. It cannot, however, escape observation, that, in the course of this violent contention, the nobles were not, as in some former disputes, leagued together in opposition to the king; but, by espousing the interest of different candidates, were led to employ their whole force against one another. Though the crown, therefore, was undoubtedly weakened, the nobility did not receive proportional strength; and the tendency of this melancholy situation was not so much to

increase the aristocracy, as to exhaust and impoverish the nation, and to destroy the effect of all subordination and government.

When we consider, in general, the state of the English constitution, from the accession of Edward the first, to that of Henry the seventh, we must find some difficulty to ascertain the alterations produced in the extent of the regal authority. That the powers of the monarch were, upon the whole, making advances during this period, it should seem unreasonable to doubt; but this progress appears to have been slow, and frequently interrupted. If, in the vigorous and successful reigns of Edward the first, of Edward the third, and of Henry the fifth, the sceptre was remarkably exalted, it was at least equally depressed by the feeble and unfortunate administration of Edward the second, of Richard the second, and of Henry the sixth. By what circumstances the prerogative acquired additional strength, under the princes of the Tudor family, we shall afterwards have occasion to examine.

CHAPTER VI.

History of the Parliament in the same Period.

AMONG the important subjects of inquiry, which distinguish the period of English history, from the accession of Edward the first to that of Henry the seventh, our first attention is naturally directed to the changes which affected the legislative power; by the introduction of representatives into parliament; by the division of that assembly into two houses, attended with the appropriation of peculiar powers to each of them; and lastly, by the subsequent regulations, with respect to the right of electing members of the national council. These particulars appear to be of such magnitude, as to deserve a separate examination.

SECTION I.

The Introduction of the Representatives of Counties and Boroughs into Parliament.

THE parliament of England, from the time of William the Conqueror, was com-

posed, as I formerly took notice, of all the immediate vassals of the crown, the only part of the inhabitants that, according to the feudal constitution, could be admitted into the legislative assembly. As the English nobility had accumulated extensive landed property, towards the latter part of the Anglo-Saxon government; as yet larger territories were acquired by many of those Norman barons who settled in England at the time of the conquest; and as the conversion of allodial into feudal estates, under the crown, occasioned no diminution in the possessions of individuals; the original members of parliament must have been, for the most part, men of great power, and in very opulent circumstances. Of this we can have no doubt, when it is considered that, in the reign of William the first, the vassals of the crown did not amount to more than six hundred, and that, exclusive of the royal demesne, the whole land of the kingdom, in property, or superiority, was divided among so small a number of persons. To these opulent barons, attendance in parliament was a duty which they were seldom unwilling to perform, as it gave them an opportunity of

asserting their privileges, of courting preferment, or of displaying their influence and magnificence. But in a long course of time, the members of that assembly were subjected to great revolutions; their property was frequently dismembered, and split into smaller divisions; their number was thus greatly increased; while the consideration and rank of individuals were proportionably impaired; and many of those who had appeared in eminent stations were reduced to poverty and obscurity. These changes proceeded from the concurrence chiefly of three different causes.

1. During that continual jealousy between the king and the nobles, and that unremitting struggle for power, which arose from the nature of the English constitution, it was the constant aim of the crown, from a consciousness of inferiority in force, to employ every artifice or stratagem for undermining the influence of the aristocracy. But no measure could be more effectual for this purpose, than to divide and dismember the overgrown estates of the nobles; for the same wealth, it is evident, which became formidable in the hands of one man, would be of no significance when

scattered among twenty. As the frequent insurrections and disorders, which prevailed in the country, were productive of numberless forfeitures, they afforded the king opportunities of seizing the property of those barons who had become obnoxious to him, and of either annexing it to the crown, or disposing of it at pleasure. In this manner a considerable part of the land in the kingdom, during the course of a century or two, passed through the hands of the sovereign, and, being distributed in such parcels as coincided with his views of policy, gave rise to a multiplicity of petty proprietors, from whose exertions he had no reason to fear much opposition to the progress of his authority.

2. Another circumstance which contributed still more effectually, though perhaps more slowly and gradually, to diminish the estates of the crown-vassals, was the advancement of arts and manufactures.

The irruption of the Gothic nations into the Roman empire; the struggles which took place during their conquest of the different provinces; the subsequent invasions carried on by new swarms of the same people, against the

states erected by their predecessors; the violent convulsions which, in a great part of Europe, were thus continued through the course of many centuries, could not fail to destroy all industry, and to extinguish the mechanical as well as the liberal professions. The rude and barbarous manners of the conquerors were, at the same time, communicated to those countries which fell under their dominion, and the fruits of their former culture and civilization being gradually lost, the inhabitants were at length sunk in universal ignorance and barbarism.

When these disorders had risen to a certain pitch, the countries which had so long poured out their inhabitants to disturb the peace of Europe, put a stop to their depredations. The northern hive, it has been said, was then exhausted. Those countries, however, were in reality so far from being drained of inhabitants, that they had increased in population. But they had become a little more civilized, and, consequently, had less inclination to roam in quest of distant settlements, or to procure subsistence by the plunder of nations who were now in a better condition to withstand them.

The greater tranquillity which was thenceforward enjoyed in the states that had been formed upon the ruins of the Roman empire, gave the people more leisure and encouragement to introduce regulations for securing property, for preventing mutual injuries, and for promoting their internal prosperity. That original disposition to better their circumstances, implanted by nature in mankind, excited them to prosecute those different employments which procure the comforts of life, and gave rise to various and successive improvements. This progress was more or less accelerated in different countries, according as their situation was more favourable to navigation and commerce; the first attention of every people being usually turned to the arts most essential to subsistence, and, in proportion to the advancement of these, being followed by such as are subservient to convenience, or to luxury and amusement. The eleventh and twelfth centuries have been marked by historians as presenting, in modern times, the first dawn of knowledge and literature to the western part of Europe; and from this period we begin to trace the rude footsteps

of manufactures in Italy, in France, and in the Netherlands.

The communication of the Normans with England, in the reign of Edward the Confessor, which began in 1041, and still more from that of William the Conqueror, contributed to spread, in this island, the improvements which had made a quicker progress upon the continent: the common arts of life were now more and more cultivated; tradesmen and mercantile people were gradually multiplied; foreign artificers, who had made proficiency in various branches of manufacture, came and settled in England; and particular towns upon the coasts of the sea, or of navigable rivers, or which happened to be otherwise advantageously situated, began to extend their commerce.

This alteration in the circumstances of society, which became more and more conspicuous through the reigns of the several princes of the Norman and Plantagenet race, was productive, as we may easily suppose, of a correspondent variation of manners. The proprietors of land, for whose benefit the new improvements were chiefly intended, endeavoured to render their situation more comfortable, by purchasing those

conveniences which were now introduced; their ancient plainness and simplicity, with respect to the accommodations of life, were more and more deserted; a mode of living more expensive, and somewhat more elegant, began to take place; and even men of smaller fortunes were tempted in this, as well as in most other particulars, to follow the example of their superiors. By an increase of their annual expence, without any addition to their annual revenue, many individuals, therefore, were laid under difficulties, found it necessary to contract debts, and being subjected to incumbrances, were at last obliged to dismember and alienate their estates.

To this general cause of alienation, we may add the epidemical madness of the crusades, by which many persons were induced to sell or mortgage their possessions, that they might put themselves in a condition for bearing a part in those unprosperous and expensive expeditions.

It may accordingly be remarked, that as, about this time, the commerce of land was rendered more frequent, it was gradually freed from those legal restraints to which it had an-

ciently been subjected. According to the simplicity of manners which had prevailed among the rude inhabitants of Europe, and which had kept estates invariably in the same families, no person was understood to have a right of squandering his fortune to the prejudice of his nearest relations*. The establishment of the feudal system produced an additional bar to alienation, from the circumstance that every vassal being a military servant, and having obtained his land as a consideration for services to be performed, could not transfer the property without the consent of his master. In England, upon the dawnings of improvement after the Norman conquest, persons who had acquired an estate by purchase, were permitted to dispose of it at pleasure; and in towns, the inhabitants of which became familiar with commerce, the same privilege was probably soon extended to every tenement, however acquired. When the disposition to alienate became somewhat more general over the country, the conveyance, even of estates descending by inheritance, was executed in a manner con-

* Vide L. L. Aelfred, c. 37.

sistent with feudal principles, by *subinfeudation;* the purchaser became the vassal of the person who sold the lands, and who still continued liable to the chief lord for all the feudal obligations. But in the reign of Edward the first a statute was made, by which an unbounded liberty was given to the alienation of landed property; and when any person sold an estate, the superior was bound to receive the purchaser as his immediate vassal*.

3. By the course of legal succession, the property of the crown vassals, or members of parliament, was also frequently broken and dismembered. The right of primogeniture, indeed, which, among the feudal nations, was introduced in order to shelter the individuals of every family under the protection of their own chief or leader, prevented, so far as it went, the division of estates by inheritance. But primogeniture had no place in female succession. Besides, the improvements of society, by enlarging the ideas of mankind, with rela-

* The famous statute *quia emptores*, passed in the 18th of Edward I. This law was farther extended, or at least received a more liberal interpretation, in the reign of Edward III.

tion to property, contributed to extend and to multiply *devises*, by which even landed possessions were bequeathed at pleasure, and, according to the situation or caprice of the owner, were liable to be split and distributed among different persons.

When the alienation of estates, together with those divisions of landed property which arose from female succession, or from devise, had proceeded so far as to threaten the destruction of great families, the nobility took the alarm, and had recourse to the artifice of entails for preserving their opulence and dignity. In the reign of Edward the first, they are said to have extorted from the king a remarkable statute, by which the privilege of entailing was greatly extended; from which it may be inferred that there had appeared, about this time, a strong disposition to alienate and dismember estates; since, in order to check the progress of the evil, this extraordinary remedy was thought requisite*.

* This was the statute of Westminster *de donis conditionalibus*, 13 Edward I. c. 1. By which it was provided, that an estate left to a person, and *the heirs of his body*, should in all cases go to the issue, if there was any; if not, should revert to the donor.

These changes in the state of landed property had necessarily an extensive influence upon the government, and more especially upon the interest and political views of those persons who composed the national council. Many of the crown-vassals were now, from the smallnes of their fortune, unable to bear the expence of a regular attendance in parliament; at the same time that they were discouraged from appearing in that assembly; where, instead of gratifying their ambition, they were more likely to meet with situations to mortify their vanity, by exposing the insignificance into which they had fallen. They were no longer in a condition to view the extensions of the royal prerogative with an eye of jealous apprehension; but had commonly more cause of complaint against the great barons, who lived in their neighbourhood, and by whom they were frequently oppressed, than against the sovereign, whose power, being more distant, and operating in a higher sphere, gave them less disturbance.

But while, from these considerations, the small barons were disposed, in many cases, to withdraw themselves from the meetings of parliament, the king had commonly an in-

terest in requiring their punctual attendance; because he found it no difficult matter to attach them to his party, and by their assistance was enabled to counterbalance the weight of the aristocracy. On every occasion, therefore, where any measure of public importance was to be agitated, the king was usually solicitous that many of the poorer members of parliament should be present; and a great part of these, on the other hand, were continually excusing themselves from so burdensome a service. The longer the causes which I have mentioned had continued to operate, in dividing and dismembering landed estates, the number of crown-vassals, desirous of procuring an exemption from this duty, became so much the greater.

Comparing the condition of the different landholders of the kingdom, towards the latter part of the Anglo-Saxon government, and for some time after the Norman conquest, we may observe a similar distinction among them, proceeding from opposite causes. In the former period, when people of small fortune were unable to subsist without the protection of their superiors, the property of many allodial

proprietors was gradually accumulated in the hands of a few; and those who possessed a landed territory of a certain extent, acquiring suitable consideration and rank, were distinguished by the title of *proceres*, or chief nobility. Under the first Norman princes, when the dependence of the lower ranks had produced its full effect in the completion of the feudal system, the owners of small estates were almost entirely annihilated; and in the condition of those opulent barons among whom the kingdom came to be divided, no difference was probably acknowledged. But when the revival of arts, and the progress of the people towards independence, had begun to dismember estates, and to multiply the vassals of the crown, the disproportion between the property of individuals became, once more, conspicuous; and the former distinction between the *great* and *small* barons excited the attention of the legislature.

The prior accumulation, and the subsequent dissipation, of wealth, had in this respect a similar effect. In amassing great fortunes some of the barons were necessarily more successful than others, which rendered estates extremely

unequal. In that state of society which tempted men to spend, or promoted the division of their estates, some proprietors proceeded likewise in this career with greater rapidity, by which the same inequality was produced.

In the great charter of king John it is ordained, that the archbishops, bishops, earls, and *greater barons*, shall be summoned to the meetings of parliament, by particular letters from the king; and that all other persons, holding immediately of the crown, shall receive a general citation from the king's bailiffs or sheriffs. But, although the more opulent vassals of the crown are thus clearly exalted above those of inferior wealth, and dignified with particular marks of respect, it is difficult to ascertain the extent of property by which those two orders of men were separated from each other. That the statute has a reference to some known boundary between them, can hardly be doubted; but whether, in order to obtain the rank and title of a *great baron*, an estate amounting to forty hides of land was requisite, agreeable to the distinction of the *chief nobility* in the reign of Edward the Confessor, or whether the qualification in

point of property had been varied according to the alteration of times and circumstances, no account can be given.

The effect of a regulation for summoning the small barons to parliament, by a general citation only, was to place them in greater obscurity, and to encourage their desertion, by giving them reason to hope that it would pass without observation. In such a situation, however, where a complete and regular attendance was not to be expected, and where each individual was endeavouring to excuse himself, and to throw as much as possible the burden upon his neighbours, an agreement would naturally be suggested to the inhabitants of particular districts, that they should relieve and succeed each other by turns, in the performance of this duty, and thus contribute to their mutual ease and advantage, by sharing among them an inconvenience which they could not entirely avoid. Of these joint measures, it was an obvious improvement, that, instead of a vague and uncertain rotation, particular persons, who appeared the best qualified for the task, and were most willing to undertake it, should be regularly elected, and

sent, at the common expence, to represent their constituents in parliament. Nor can it be doubted that the king would be highly pleased with such an expedient, by which he secured a proportion of the small barons in the ordinary meetings of the national council, and which did not hinder him from convening a greater number on extraordinary occasions.

In this manner the knights of shires appear to have been first introduced into parliament. The date of this remarkable event cannot be fixed with precision; but it was undoubtedly as early as the reign of Henry the third*. The division of counties produced a separate association among the crown vassals, in each of

* The records of parliament, for several reigns after the Norman conquest, are in a great measure lost, having probably, during the barons' wars, been destroyed alternately by each prevailing party, who found them unfavourable to their interest. [Prynne's Preface to Cotton's Abridgment of Records in the Tower.] This circumstance accounts for the great obscurity in which, after all the labour of antiquaries, the origin of so great a change in the constitution of that assembly still remains. The first introduction of representatives of counties may, with some probability, be traced as far back as the reign of king John. See Carte's Hist. Reign of Edward I.

those districts, for electing their own representatives. The number of these appears to have been originally precarious, and probably was varied in different emergencies. On different occasions we meet with four knights called from each county; but they were gradually reduced to two, the smallest number capable of consulting together for the interest of their constituents *.

The same changes in the state of the nation, which contributed principally to the rise of the knights of shires, introduced likewise the burgesses into parliament.

By the advancement of agriculture, the peasants, in many parts of Europe, had been gradually emancipated from slavery, and been exalted successively to the condition of farmers, of tenants for life, and of hereditary proprietors. In consequence of the freedom attained by this inferior class of men, a great proportion of them had engaged in mechanical employ-

* In the eleventh year of Edward I. four knights were summoned for each county. [Brady's Hist. of England.] In the reign of John, there had been a writ issued to the sheriff of Oxfordshire, to return four knights for that county. Carte, in the reign of Edward I.

ments; and, being collected in towns, where the arts were most conveniently cultivated, had, in many cases, become manufacturers and merchants. The situation of these manufacturing and trading people enabled them, after the disorders which prevailed in Europe had in some measure subsided, to make a rapid progress in improving their circumstances, and in acquiring various immunities and privileges. By mutual emulation, and by the influence of example, the inhabitants of the same town were excited to greater industry, and to the continued exertion of their talents; at the same time that they were in a capacity of uniting readily for mutual defence, and in supporting their common interest. Being originally the tenants or dependents, either of the king or of some particular nobleman, upon whose demesne they resided, the superior exacted from them, not only a rent for the lands which they possessed, but various tolls and duties for the goods which they exchanged with their neighbours. These exactions, which had been at first precarious, were gradually ascertained and fixed, either by long custom, or by express regulations. But, as many artifices had, no

doubt, been frequently practised, in order to elude the payment of those duties, and as, on the other hand, the persons employed in levying them were often guilty of oppression, the inhabitants of particular towns, upon their increasing in wealth, were induced to make a bargain with the superior, by which they undertook to pay a certain yearly rent, in room of all his occasional demands: and these pecuniary compositions, being found expedient for both parties, were gradually extended to a longer period, and at last rendered perpetual.

An agreement of this kind appears to have suggested the first idea of a *borough*, considered as a *corporation*. Some of the principal inhabitants of the town undertook to pay the superior's yearly rent, in consideration of which they were permitted to levy the old duties, and became responsible for the funds committed to their care. As managers for the community, therefore, they were bound to fulfil its obligations to the superior; and, by a natural extension of the same principle, it came to be understood that they might be prosecuted for all its debts; as, on the other hand, they obtained, of course, a right of pro-

secuting all its debtors. The society was thus viewed in the light of a body politic, or fictitious person, capable of legal deeds, and executing every sort of transaction by means of certain trustees or guardians.

This alteration in the state of towns was accompanied with many other improvements. They were now generally in a condition to dispense with the protection of their superiors; and took upon themselves the burden of keeping a guard, to defend them against a foreign enemy, and to secure their internal tranquillity. Upon this account, beside the appointment of their own administrators, they obtained the privilege of electing magistrates, for distributing justice among them. They became, in a word, a species of *soccage tenants*, with this remarkable peculiarity in their favour, that by remaining in the state of a corporation from one generation to another, they were not liable to the *incidents* belonging to a superior, upon the transmission of lands to the heirs of a vassal.

The precise period of the first incorporation of boroughs, in the different kingdoms of Europe, is not easily determined; because the

privileges arising from the payment of a fixed rent to the superior, in the room of his casual emoluments, and the consequences which resulted from placing the revenue of a town under permanent administrators, were slowly and gradually unfolded and brought into the view of the public. In the eleventh and twelfth centuries, we may trace the progress, if not the first formation, of those communities, in Italy and in Germany, which corresponds with the advancement of trade and manufactures in those countries*. The towns in France are said by Father Daniel to have been first incorporated in the reign of Lewis the Gross; but it appears that they had then acquired considerable privileges, were intrusted with their own government, and the inhabi-

* With respect to the rise of the cities of Italy, see Muratori Antiq. Ital. Med. Ævi, tom. iv. The advancement of the German free cities appears to have been rather posterior to that of the Italian; their chief privileges having been acquired under the princes of the Swabian family. They attained their highest pitch of grandeur in consequence of the famous Hanseatick confederacy, which began in the year 1241. See Abrégé de l'histoire et du droit public d'Allemagne, par M. Pfeffel.

tants were formed into a militia for the service of the crown*.

In the reign of Henry the first of England, the cotemporary of Lewis the Gross, the inhabitants of London had begun to farm their tolls and duties, and obtained a royal charter for that purpose†. Their example was followed by the other trading towns, and from this time forward, the existence of English boroughs becomes more and more conspicuous.

When the towns, under the immediate protection of the king had been incorporated, and, of course, exalted into the rank of crown-vassals, it was agreeable to the general system of the feudal policy, that they should have a voice in the national council; and more especially, when extraordinary aids, beside their constant yearly rent, were demanded from them, as well as from the other tenants *in capite*, that they should have an opportunity of refusing or consenting to these demands. Their attendance in that assembly was, at the same

* M. Pfeffel's History of the reign of Lewis VII.

† Hume's History of England.

time, of advantage to the sovereign, and even more so than that of the small barons; for the trading people of all the inferior part of the nation were the most liable to be insulted and oppressed by the nobles, and were of consequence proportionably attached to the monarch, who had found his account in protecting and supporting them.

It was impossible, however, that all the members of every royal borough should assemble in order to deliberate upon the business of the nation; and in this, as well as in the separate concerns of each respective community, it was natural for them to commit the administration to particular commissioners or representatives. In England, accordingly, it appears, that after the boroughs had been incorporated, and had been raised, by their trade, to a degree of consideration and independence, they began to send representatives into parliament. The records of parliament, as has been before remarked, during several reigns after the Norman conquest have not been preserved; so that it is no less uncertain at what precise time the burgesses, than at what time the knights of shires, made their first ap-

pearance in that assembly; but as those two events proceeded from the same cause, the advancement of commerce and manufactures, it is probable that they were nearly coeval*.

In the great charter of king John, it is expressly ordained, that aids shall not be imposed upon the boroughs without the consent of parliament; from which it may be inferred, that those communities had then acquired the rank of soccage tenants, and that matters were at last ripened and prepared for their introduction into the councils of the nation. The first instance upon record of the burgesses attending in parliament, occurs in the forty-ninth year of the reign of Henry the third; when they are said to have been called by the famous earl of Leicester, in order to support his ambitious views: but this is not mentioned by any historian as a late innovation; neither is it probable that this nobleman, at the very time when he was endeavouring to screen himself from the resentment of the nation,

* Sir Henry Spelman declares, that, from the most careful examination, he could find no traces of the representatives of boroughs in parliament, before the latter part of the reign of Henry III. Glossar. v. Parliamentum.

would have ventured to open a new source of discontent, by making a sudden and violent change in the constitution. It is likely that some of the burgesses had been present in former parliaments; as we find that they afterwards were, upon two different occasions, in the early part of the reign of Edward the first; but the number of them was not fixed; nor were they accustomed to give a regular attendance.

The policy of Edward the first led him to take hold of the circumstances, which have been mentioned, for promoting the interest of the crown. In the twenty-third year of his reign, directions were given to summon regularly the knights of the shires, together with the burgesses; of which, after the example of the former, two were generally sent by each borough; and from that period, both these classes of representatives continued to be constant members of the legislature.

The same circumstances, according as they existed more or less completely, in the other countries of Europe, were productive of similar changes in the constitution of their national councils.

In Scotland, a country whose government and laws bore a great analogy to those of England, not only from the common circumstances which operated upon all the feudal nations, but also from that vicinity which produced an intercourse and imitation between the two countries, that parliament, as far back as we can trace the records of Scottish history, appears to have been composed of the greater thanes, or independent proprietors of land. The representatives of boroughs are supposed by historians to have been first introduced into its meetings during the reign of Robert Bruce, which corresponds to that of Edward the second; but satisfactory evidence has lately been produced, that this event must have happened at an earlier period*. From the slow progress, however, of trade in Scotland, the number of burgesses in her national council was for a long time inconsiderable; and their appearance was limited to a few extraordinary cases.

The representatives of counties became con-

* See Dr. Stuart's acute researches into the ancient government of Scotland.

stituent members of the Scottish parliament by the authority of a statute, which, being still preserved, affords great light with respect to the origin of this establishment both in Scotland and in England. By that statute it is provided, that the smaller vassals of the crown should be excused from personal attendance in parliament, upon condition of their sending representatives, and maintaining them at the common expence. This regulation was introduced by James the first, who, as he had resided for many years in England, and was a prince of learning and discernment, had probably been induced to copy this branch of policy from the institutions of a people, among whom the monarchy had made greater advances than in his own country. But the Scottish barons, whose poverty had given occasion to this regulation, laid hold of the dispensation which it bestowed upon them, without fulfilling the conditions which it required; and it was not until the reign of James the sixth, that their obligation to send representatives into parliament was regularly enforced.*

* In the reign of James the first, we meet with two

In France, the representatives of boroughs, according to the most probable account, were first introduced into the national assembly in the reign of Philip the Fair, by whom they are said to have been called for the purpose chiefly of consenting to taxes.* It is remarkable, however, that in the French *convention of estates*, no set of men, corresponding

statutes upon this subject. By act 1425, c. 52. it is required, that all the *freeholders* shall give personal attendance in parliament, and not by a *procurator*; unless they can prove a lawful cause of their absence. Afterwards, by a statute 1427, c. 102. it is enacted, "that the small "barons and free tenants need not come to parliaments, "provided that, at the head court of every sheriffdom, "two or more wise men be chosen, according to the ex- "tent of the shire, who shall have power to hear, treat, "and finally to determine all causes laid before parlia- "ment; and to chuse a *speaker*, who shall *propone* all and "sundry needs and causes pertaining to the commons in "parliament."

From these two acts of parliament, it is evident the king had first endeavoured to enforce the attendance of all the small barons; and, upon finding this impracticable, had resorted to the expedient of introducing representatives.

* This happened about the year 1300. See Pasquier Recherches de la France.

to the knights of shires in England, was ever admitted. The improvement of arts, in France as well as in England, contributed not only to raise the trading people, but also to dismember the estates of many proprietors of land; but the king does not seem to have availed himself of that situation for obliging the small barons to send representatives into the national council. The greater authority possessed, about this period, by the French monarch, was probably the cause of his not resorting to the same shifts, that were practised in England, to counterbalance the power of the aristocracy. That a sovereign should court the lower part of his subjects, and raise them to consideration, with a view of deriving support from them, is none of the most agreeable expedients; and nothing, we may suppose, but some very urgent necessity, could make him think of submitting to it.

The circumstance now mentioned, created a most essential difference between the national council in France and in England; the latter comprehending the representatives of counties as well as of boroughs, and consequently a large proportion of the people; whereas the former

admitted no other representatives but those of boroughs, the number of which, in either country, was for a long time inconsiderable.

The free cities of Germany had, in the thirteenth century, acquired such opulence as enabled them to form that famous Hanseatick league, which not only secured their independence, but rendered them formidable to all the military powers in their neighbourhood. From these circumstances they rose to political power, and obtained a seat in the diet of the empire. But in Germany, the representatives of the small barons were not admitted into that assembly, from an opposite reason, it should seem, to that which prevented their admission into the French convention of estates. At the time when the rise of commerce had led the way to such a regulation, the nobility, and the free states of the empire, had so firmly established their independence, and the emperors had so far declined in authority, that it was vain to expect, by any artifice or exertion, to stop the progress of the aristocracy. The great exaltation of the German states had indeed produced a wide difference in the power and dignity of the different nobles; and those

of inferior rank, instead of maintaining an equal voice with their superiors, were at length associated in different classes; each of which, having only a single vote in the diet, were, in fact, reduced to a worse condition than if they had acted by representatives.

In Flanders, in the several principalities which afterwards composed the Spanish monarchy, and, in general, in all the feudal governments of Europe, we may observe, that whenever the towns became free and opulent, and where they continued members of a larger community, they obtained a seat in the legislative assembly. But with respect to the representatives of the small barons, or inferior nobles, their introduction into the legislature is to be regarded as a more singular regulation, which, depending upon a nice balance between the crown and the nobility, has been adopted in some countries, and in others neglected, according as it happened to suit the interest and policy of the sovereign, or the peculiar circumstances of the people.*

* The boroughs are said to have been introduced into the *cortes* of the different petty kingdoms of Spain, about the same time as in the other nations of Europe. In each

In Italy, a country which had been broken into small principalities, under princes possessed of little power, or residing at such a distance as to have little capacity of exerting it over the inhabitants, the principal towns, whose prosperity in trade, if we except the territories belonging to the Moors in Spain, was prior to that of the other parts of Europe, became separate and independent states; and fell under such modes of republican government as were agreeable to the situation of their respective societies.

From a connected view of the different countries of Europe, during the period now under examination, it seems hardly possible to entertain a doubt, that the representatives in the English parliament were introduced in the manner, and from the causes, which have been

of those kingdoms the cortes came to be composed of the nobility, of the dignified ecclesiastics, and the representatives of the cities. But in none of them do we find that the representatives of the small proprietors of land were admitted into those assemblies; though, in the kingdom of Arragon, it appears that the nobility were distinguished into those of the first, and those of the second rank. See Dr. Robertson's History of Charles V.

specified. It appears, at the same time, surprising, and may perhaps be considered as an objection to the account which has been given, that there is a profound silence, among all cotemporary writers, concerning this important event. The historians of that age, it is true, were neither philosophers nor politicians; they were narrow-minded and bigotted ecclesiastics, who saw nothing of importance in the history of England, but what was immediately connected with those religious institutions to which they were devoted. But still it may be said, that if the commons were unknown in the early assemblies of the nation, the introduction of that order of men into parliament, would have been such a novelty, as could hardly fail to strike the imagination, and to be mentioned in some of the writings of those times.

It is necessary, however, to remark, that this alteration was produced in a gradual manner, and without any appearance of innovation. When the knights of shires began to attend the meetings of parliament, they were no other than barons formerly entitled to that privilege. Their being sent at the common expence of the small barons be-

longing to a district, was a circumstance that would excite little attention; as it probably arose from the private contribution of the parties concerned, not from any public regulation. The burgesses, in like manner, were not admitted into parliament all at once, or by any general law of the kingdom; but when particular towns, by their incorporation, and by the privileges bestowed upon them, had acquired the rank of crown-vassals, their obtaining a share in the legislature, by means of representatives named for that purpose, was a natural consequence of their advancement. This privilege, so far from being regarded as new or uncommon, had regularly been acquired by such of the churles, or peasantry, as were exalted to the condition of soccage tenants; and was in reality a consequence of vassalage, interwoven in the system of that feudal government, with which the people of that age were familiarly acquainted. Neither was it likely that the appearance, from time to time, of a few of these inferior persons, along with the greater lords of parliaments, would have an apparent tendency to vary the deliberations of that assembly; and the practice had, in all pro-

bability, been long continued, and greatly extended, before the effects of it were of such magnitude as to attract the notice of the public.

SECTION II.

The Division of Parliament into two Houses, and the peculiar Privileges acquired by each House.

THE members of the great council, in all the feudal governments of Europe, were divided originally into two classes or orders; the one composed of ecclesiastical, the other of lay barons. These two sets of men, from their circumstances and way of life, having a different interest, and being actuated by different views of policy, entertained a mutual jealousy, and were frequently disposed to combat and thwart the designs of each other. In the conduct of national business, they usually held separate conferences among themselves; and when they afterwards came to a joint meeting, were accustomed, instead of voting promiscuously, to deliver, upon the part of each, the result of their previous deliberations. As each of those bodies was possessed of independent

authority, it would have been dangerous to venture upon any measure of importance, in opposition to the inclination or judgment of either; and, therefore, in all public transactions which they had occasion to determine, the concurrence of both was held indispensable. Hence, by long custom, they became two separate *estates*, having each a negative upon the resolutions of the legislature.

When the burgesses were admitted into the national assembly, they were, by their situation and character, still more distinguished from the ecclesiastical and lay barons, than these last from each other. They acted, not in their own name, but in the name of those communities, by whom they had been appointed, and to whom they were accountable: at the same time that the chief object in requiring their attendance, was to give their consent to such peculiar aids, or taxes, as were demanded from their constituents. It was necessary, therefore, that they should consult among themselves, in matters relating to their peculiar interest; and, as the department allotted them was unconnected with that of all the other members, they naturally obtained a

separate voice in the assembly. We may easily conceive, that when this method of procedure had been established in the imposition of taxes, it was afterwards, upon the subsequent rise of the burgesses, extended to every branch of parliamentary business, in which they claimed the privilege of interfering. Thus, in all the feudal kingdoms which had made advances in commerce, the great council came to be composed of three estates: each of whom, in the determination of public measures, enjoyed a separate negative.

Whether these different classes of men should be convened in the same, or in different places, depended, in all probability, upon accident, and in particular on the number of their members, which, at the times of their meeting, might render it more or less difficult to procure them accommodation. In England, the prelates, and the nobility, were accustomed, in ordinary cases, to meet in the same place; although it is likely that each of them, in order to settle their plan of operations, had previous consultations among themselves. When the deputies from counties and boroughs were first

called into parliament, they proceeded upon the same plan, and were included in the same meeting with the ancient members. It is probable that the boroughs, then in a condition to use this privilege, were not numerous. To a parliament held in the eleventh of Edward the first, we find that no more than twenty towns were required to send representatives; of which two were summoned from each town *. But upon the regular establishment of the deputies from counties and boroughs, in the twenty-third year of that reign, the number of the latter was greatly increased. The returning boroughs, from each of which two representatives were generally required, are said to have then amounted to about an hundred and twenty; besides those belonging to Wales, of which there are supposed to have been about twelve †.

* The trading towns, who sent representatives to this parliament, were London, York, Carlisle, Scarborough, Nottingham, Grimesby, Lincoln, Northampton, Lynne, Yarmouth, Colchester, Norwich, Chester, Shrewsbury, Worcester, Hereford, Bristol, Canterbury, Winchester, and Exeter. See Carte's Hist.

† Some of these boroughs, however, were omitted in the summons to future parliaments. Mr. Browne Willis,

From the number of the burgesses at this time, from the influence and weight which they had acquired, and from their peculiar character and circumstances, as representing the commercial interest, they now found it convenient, it should seem, to have a different place of meeting from the other members of parliament, and began to form a separate body, which was called the house of commons.

from a diligent inspection of such materials, as he could find, to afford any information upon this point, is of opinion, that from about the middle of Edward the third's reign, to the beginning of that of Edward the sixth, the parliament consisted of a pretty uniform number of boroughs: that, about this last period, it consisted of 126, and at no former time amounted to 130. See Notitia Parliam.

Mr. Hume asserts, that the sheriff of each county had anciently a discretionary power of omitting particular boroughs in his returns, and was not deprived of this power till the reign of Richard II. [Hist. 4to, vol. ii. p. 287.] In proof of this assertion, he refers to 5 Richard II. c. 4. But that statute proves the direct contrary. It declares, "That if any sheriff leaves out of his returns any "cities or boroughs which be bound, and of old time were "wont to come to the parliament, *he shall be punished in* "*the manner as was accustomed to be done in the said case in* "*times past.*" Statutes at Large.

The knights of shires continued, for some time after, to sit in what now became the house of peers. Although the small barons were, in general, excused from personal attendance, yet, as crown-vassals, they had still a title to vote in parliament; and such of them as attended, even in consequence of an election, were at first considered in the same light with the greater nobility. By appearing frequently, however, in the capacity of mere representatives, not only elected, but having their charges borne by their constituents, their privilege of attending in their own right was gradually lost and forgotten. In consequence of the progressive alienation and division of landed property, their personal influence was continually sinking, while that of the mercantile people was rising in the same proportion; and, as these two classes were thus brought nearer to a level, the landed gentry were often indiscriminately chosen to represent either the one or the other. In such a situation, it became at length an obvious improvement, that the deputies of the counties and boroughs, as by the circumstance of their being representa-

tives, and responsible to those who had appointed them, they were led into a similarity of procedure, should meet in the same house, and carry on their deliberations in common. It is conjectured by Carte, the historian, that this change was not effected before the latter part of the reign of Edward the third; but with respect to the precise time when it happened, there seems to be no evidence whatever.

The coalition of these two orders of deputies may perhaps be regarded as the great cause of the authority acquired by the English house of commons. The members of that house were by this measure exalted to higher consideration and respect, from the increase of their numbers, as well as from the augmentation of their property. They now represented the mercantile people and the landed gentry; who, exclusive of those who remained in a state of servitude, composed the great body of the people, and who possessed a great proportion of the national wealth. Of those two classes of the free inhabitants, the landed gentry, for a long time, enjoyed the first rank; and the deputies of boroughs were therefore frequently

chosen among the neighbouring gentlemen, who, by reason of their independence, were more capable than their own burgesses of protecting their constituents. By joining together and confounding these different orders of representatives, the importance of either was in some degree communicated to both; at the same time that the people, under so many leaders, became attentive to their common privileges, and were taught to unite in defending them. Had all the constituents been to appear in the national council, they would have been a disorderly multitude, without aim or direction: by choosing deputies to manage their parliamentary interest, they became an army, reduced into regular subordination, and conducted by intelligent officers.

We accordingly find, that, even so early as the reign of Richard the second, the commons, when they had been induced to take party with the crown, were able to defeat the designs of the nobility, and to raise the sovereign from the lowest extremity to the height of absolute power. The sudden revolution, produced at that time by the national representa-

tives, was a prelude to those greater exertions, which, at a subsequent period, they displayed in a better cause.

In the principal kingdoms upon the continent of Europe, the *third estate* was differently constituted. It comprehended, as I formerly observed, no other deputies but those of the trading towns; a set of men, who, in comparison even of the small barons, or inferior gentry, were long obscure and insignificant. In supporting their privileges, the boroughs were not aided by the joint efforts of the counties; and the family interest of the representative was not super-added to the weight of his personal wealth.

In some of those kingdoms, therefore, as in France and in Spain, the monarch was enabled to break the aristocracy, and to annihilate the national council, before the *third estate*, in consequence of the advancement of commerce, was in a condition to establish its authority; in others, as in the German empire, the great nobles, before the deputies of towns had acquired much influence in the *diet*, reduced the power both of that assembly, and of the emperor, to a mere shadow.

After the members of parliament had been accustomed to meet regularly in two separate places, the three estates were gradually melted down and lost, in the division of the two houses. The ecclesiastical and lay barons, who sat in the upper house, were led, most frequently, into a promiscuous deliberation; and did not think it worth while to demand a separate voice, except in determining any nice or important question, by which the interest of either was particularly affected. But as government came to be more established upon a regular plan, those extraordinary questions occurred less frequently; at the same time that the progress of knowledge, and of the arts, diminished the influence of the clergy, and rendered them less willing to hazard a direct and avowed contest with the nobles. The custom of deliberating promiscuously, was thus more and more confirmed, and the exertions of a separate negative, being considered as indications of obstinacy or a factious disposition, were marked with disapprobation and censure, and at length entirely exploded. It appears that, in the time of Richard the second, this innovation was not entirely compleated.

The two houses, on the other hand, having occasion always to deliberate apart, acquired an independent authority, and were naturally regarded as distinct branches of the legislature. The resolutions of each house constituted a separate voice; and the concurrence of both was necessary in all the determinations of parliament.

After the formation of the two houses of parliament, in the manner just mentioned, each of them came to be possessed of certain peculiar privileges; which, although probably the objects of little attention in the beginning, have since risen to great political importance.

1. The house of commons, from the nature of its original establishment, obtained the sole power of bringing in money-bills. This was not, at first, regarded as a privilege, but was introduced merely for the sake of dispatch. The primitive house of commons was composed of burgesses only, empowered to grant the king a supply, by one general agreement, in place of the separate bargains, which had formerly been made with each borough. In conducting this business, each borough seems to have directed its repre-

sentatives with respect to the rate of assessment to which they should consent; and by collecting these particular directions, the sum total to be granted by the whole trading interest was easily ascertained. In a matter so simple as that of determining the extent of the contribution, which, on any particular occasion, they were willing to make, the constituents found no difficulty either in preparing their deputies, by expressing a previous opinion upon the subject, or by sending them clear and pointed instructions, in case, from any new exigence, after the meeting of parliament, an unexpected demand was made by the sovereign.

According to this constitution of parliament, the imposition of taxes produced no intercourse between the two houses; but each house consented to the exactions laid upon that order of men with which it was connected. This method of procedure was continued so long as the house of commons consisted only of burgesses; but when the deputies from counties came to sit and deliberate along with them, a variation was necessary. The deputies of the counties having, by this change, assumed entirely the character of representatives, came

naturally to be limited, in the same manner as the burgesses, by the instructions of their constituents*. But those two orders of men, who now formed the cumulative body of the commons, were connected with different parts of the nation; and, while the burgesses were interested in the taxes laid upon the boroughs, the county-members had an equal concern in such as were paid by the landed gentry. In their promiscuous deliberations, therefore, upon the subject of taxation, it was found convenient, that each of them should not confine their views to that part of the community which they represented, but should agree in the duties to be paid in common by the whole of their constituents; and, as the taxes paid by landed gentry or small barons were of the same nature with those which were laid upon the great barons or peers, this naturally suggested the idea of a general assessment upon the nation at large, to be imposed by the concurrence of both houses of parliament. Hence

* In a parliament held in the year 1339, that is, about the middle of the reign of Edward the third, we find the knights of shires pleading that they durst not grant a tax without the consent of their constituents. Carte.

the introduction of *tenths*, *fifteenths*, and *subsidies*; the two former of which were taxes upon personal property; the last, upon estates real and personal. In the imposition of such taxes, both houses of parliament were equally concerned; and the concurrence of both was therefore held requisite.

The house of commons, however, if the precise sum to be granted by them had not been previously specified, were accustomed, in cases of this nature, to consult their constituents, and to regulate their conduct by the instructions which they received.

They could have no debate, therefore, on any occasion, upon the subject of taxation; as their province extended no farther than merely to declare the determination of their constituents. Upon this account, it was to no purpose that any particular tax should first become the subject of deliberation among the peers, and afterwards be submitted to the consideration of the commons; since, after the fullest and most laborious discussion of the question by the former, no other point could be considered by the latter, but whether the intended supply was agreeable to their instructions. The

most expedient course, in order to save time and useless disputation, was evidently, that the commons should begin with stating the exact sum which they had been empowered to grant; and that the tax proposed by them should afterwards be examined and canvassed in the house of peers, whose conduct, in this as well as in other particulars, was not subject to any direction or controul.

From the same circumstance which introduced the practice, that every proposal for a tax should originate in the house of commons, it became customary that every such proposal or bill, when presented to the house of peers, should receive their simple assent, or negative, without variation or amendment. It could answer no purpose, to return the bill, with amendments, to the house of commons; because the members of that house had no power of deliberating upon such matters, and, having once declared the opinion of their constituents, could not venture to deviate from it in any subsequent stage of the business.

It is probable, at the same time, that this mode of conducting the business of taxation was promoted by the king; who, finding the

people of inferior condition most ready to acquiesce in his demands, was willing that, by taking the lead in the imposition of taxes, they might incite the nobility to follow their example, and make them ashamed of declining a burden which they were much more able to bear.

Such appears to have been the origin of this important privilege, which is now justly regarded by Englishmen as one of the greatest pillars of their free constitution. Like many other parts of the British government, it arose from views of immediate conveniency; and its distant consequences were neither foreseen nor intended: but, after it had received the sanction of immemorial custom, it was preserved inviolable, without any consideration of the circumstances from which it had taken its rise. As the commons interfered by degrees in legislation, and in various other branches of business, their interpositions became too extensive and complicated, to permit that they should be regulated by the opinion of constituents living at a distance. In consequence of more liberal views, it came also to be considered as the duty of each representative to pro-

mote the good of the nation at large, even in opposition to the interest of that particular community which he represented. The instructions, therefore, of constituents were laid aside, or regarded as producing no obligation, upon any set of deputies, to depart from the dictates of their own conscience. The expediency of this important privilege, with which the house of commons came thus accidentally to be invested, will fall more properly to be examined hereafter.

2. Upon the establishment of the two houses of parliament, the supreme judiciary power was, on the other hand, appropriated to the house of peers. The jurisdiction belonging to the Saxon Wittenagemote was exercised promiscuously by all the members of that assembly; and in the Norman parliaments, both before and after the formation of the *aula regis*, the same rule was observed. It seems, however, to be a principle of natural law, that when a magistrate of any sort is invested with jurisdiction, he is bound to a personal discharge of the duties of his office, and has no power to commit the exercise of them to a delegate. The public, by whom he is appointed, has a

right to the fruit of that capacity or diligence, upon account of which he was selected to the office; and as, in the decision of law-suits, no security can be given that different individuals will act precisely in the same manner, the appointment of a delegate for the discharge of this employment, would be to impose upon the public a different rate or measure of service from that which was due. Upon this principle, the members of the house of commons, having only a delegated power, were excluded from the exercise of that jurisdiction with which the members of parliament, in general, had been anciently invested. Their disqualification, at the same time, was rendered still more apparent, by their acting in consequence of instructions from their constituents. The counties and boroughs might be in a condition, from their general information, to instruct their deputies concerning the taxes to be imposed, or even concerning any law to be enacted, but were altogether incapable of directing them how to proceed in the determination of law-suits. The decision given in any cause must depend upon a complex view of the proofs and arguments produced in court;

and, therefore, no person who is absent, especially in cases where the chief part of the business is transacted *viva voce*, can form any proper judgment concerning it. Upon this account, the only members of parliament, qualified to act as judges, came to be those who sat in their own right, who had the liberty to form their opinions upon the spot, and, by an immediate investigation of the circumstances, were capable of deciding from the impression made upon their own minds.

From the same cause, therefore, which bestowed upon the commons the right of suggesting taxes, the house of peers became the ultimate tribunal of the nation, and obtained the power of determining, in the last resort, both civil and criminal actions. Thus, while one of these branches of the legislature enjoyed an immediate access to the purses of the people for the public service, the other was intrusted with the guardianship of their lives and fortunes. What was acquired by the commons, in one department, was fully compensated by what fell to the share of the peers in another; so that the constitution remained upon its an-

cient basis, and was kept in equilibrio by an equal distribution of privileges.

It may farther deserve to be remarked, that, by the exclusion of the commons from the judicial power, the supreme tribunal of the nation came to be composed of a moderate number of persons; a circumstance highly conducive to the uniformity of their decisions, as well as to the expedition and regularity of their procedure.

When law-suits before the Norman parliament had become frequent, it was found inconvenient to determine them in a full meeting, and they were brought, in the first instance, before the *aula regis*. But even as a court of review, the parliament, after the deputies of boroughs and counties were obliged to give constant attendance, was perhaps too numerous; while, by the division of its members into two houses, they were prevented, at least, according to their usual forms, from co-operating with one another in the distribution of justice. The same regulation, therefore, which was introduced from the peculiar situation of the lords and of the commons, was

afterwards recommended, no doubt, and supported by general considerations of utility.

3. The supreme judiciary power being limited to the house of peers, the right of *impeachment* was of course devolved upon the commons.

When the persons intrusted with great offices under the crown, or enjoying any share in the public administration, were guilty of malversation in office, or of what are called high misdemeanors, it was frequently thought necessary, that they should be tried before the highest court in the nation, whose weight alone was adequate to the task of bringing such powerful offenders to justice. In the earlier periods of the English government, the national council was accustomed to inquire into the conduct of the different executive officers, and to punish them for their offences. The king himself was not exempted from such inquiry and punishment, more than persons of inferior rank. On such great occasions, the prosecution, instead of being committed, as in ordinary crimes, to the management of an individual, was usually conducted by the assembly, who acted both in the capacity of accusers and

judges. This was, doubtless, a practice ill calculated for securing a fair trial to the delinquent; but it was no more than what happened in criminal trials before the ordinary courts of justice, where the king was both judge and prosecutor.

Upon the establishment of the two houses of parliament, it became a natural and obvious improvement, that, as the power of trying those offences was restricted to the house of peers, the privilege of conducting the accusation should belong to the commons; that branch of the legislative assembly, which had no share in the judicial department, though it was no less concerned than the other to prevent the abuses of administration. In this manner the two characters of a judge and a prosecutor, which, in the ordinary courts, had been placed in different hands by the custom of appointing deputies to officiate in the name of the crown, came likewise to be separated in the trial of those extraordinary crimes, where, from the danger of arbitrary measures, an amendment of the ancient method of proceeding was most especially requisite.

4. Beside the foregoing privileges, which,

from the influence of peculiar circumstances, were acquired by the different branches of parliament, either house was led to assume the power of ascertaining the persons of whom it was composed; a jurisdiction and authority over them, and the cognizance of the several rights and immunities belonging to their own order. Hence it came to be established, that the house of commons should determine questions concerning the election of its own members; and that every bill affecting the rights of the peerage should take its origin in the house of peers. The privileges arising from this principle, which have been acquired by the house of commons, were afterwards greatly multiplied, and variously subdivided, in consequence of the attention given by that house to the forms of its procedure, and to the rules and maxims necessary for securing its independence.

SECTION III.

Concerning the Manner of electing the national Representatives, and the Forms of Procedure in Parliament.

THE establishment of a house of commons, consisting entirely of representatives, required a set of regulations for the election of its members. From the different situation of the counties and boroughs, the deputies of those two classes of men came to be chosen in a very different manner.

1. Upon the first incorporation of a borough, the nomination of particular persons, for distributing justice, for managing the funds, and for executing the other business of the community, would seem naturally to belong to all its members, who have a common concern in those branches of administration. In those towns, accordingly, where commerce had introduced a degree of wealth and independence among the bulk of the inhabitants, such a popular plan of government appears to have been generally adopted. But in many of the

boroughs, whose trade was more in its infancy, the people of inferior rank were still too poor, and in too servile a condition, to claim the privilege of electing their own administrators; and by their neglecting to intermeddle in public business, the care of every thing relating to the community was devolved upon particular citizens, distinguished by their opulence. When the boroughs were afterwards permitted to have a voice in parliament, the differences in their condition occasioned the same, or even a greater diversity in the mode of choosing their representatives; and, in a long course of time, many other varieties were added, from the operation of accidental circumstances. In some towns, therefore, the representatives were chosen by a considerable part, in others, by a very small proportion, of the inhabitants; in many, by a few individuals, and these, in particular cases, directed, perhaps, or influenced, by a single person.

Two sorts of inequality were thus produced in the representation of the mercantile and manufacturing interest; the one from the very different magnitude of the boroughs, who sent, for the most part, an equal number of representatives: the other, from the very

different number of voters, by whom, in each borough, those representatives were chosen. But this inequality, whatever bad consequences may have flowed from it in a later period, was originally an object of little attention, and excited no jealousy or complaint. The primitive burgesses were sent into parliament for the purpose chiefly of making a bargain with the crown, concerning the taxes to be imposed upon their own constituents; and the representatives of each borough had merely the power of consenting to the sum paid by that community which they represented, without interfering in what was paid by any other. It was of no consequence, therefore, to any one borough, that another, of inferior size or opulence, should have as many representatives in the national assembly: since those representatives, as far as taxes were concerned, could only protect their own corporation, but were incapable of injuring or hurting their neighbours. So far were the boroughs from entertaining a jealousy of one another upon this account, that some of them found it more eligible to acquiesce in whatever aids the king thought proper to demand, than to be at the expence of supporting their depu-

ties in parliament; and were willing to renounce the privilege, in order to be free of the burden attending it. Many instances of this occur in the English history, from the reign of Edward the first. Mr. Browne Willis has produced a large list of boroughs, which had early sent representatives into parliament, but which lost that privilege by disuse; and there is no doubt that several towns, which had been incorporated, and which obtained the denomination of boroughs, exerted themselves from the beginning, and successfully, in avoiding any parliamentary representation.

Neither was it originally of much importance to any parliamentary borough, in what manner its deputies were chosen; for these, being instructed by the corporation, with respect to the precise amount of the supply to be granted, were only the messengers, who declared the will of their constituents; and as they were not intrusted with discretionary powers, their behaviour occasioned no apprehension or anxiety. The honour of being the representative of a borough was, in those times, little coveted; and the privilege of voting in his election was yet less. The rank which the

burgesses held in parliament was too low to become the object of much interest or solicitation; and those who voted for a burgess, were so far from gaining any thing by it, that they had scarcely an opportunity of obliging their friends.

2. The knights of the shires were at first elected, in each county, by a meeting composed of the small barons, or vassals of the crown. Of this, from the nature of the thing, it seems hardly possible to doubt. The small barons had been originally members of parliament, but were excused from personal attendance, upon condition of their sending representatives. Who could have a right to chuse those representatives, but the persons whom they represented; the persons by whom they were sent; and who bore the charges of their attendance?

But although the vassals of the crown only had, in the beginning, a right to interfere in the appointment of the knights of shires; the *rear-vassals*, or such as held their lands of a subject-superior, were afterwards admitted to a share in the election. This, although an important change in the constitution of par-

liament, has, passed, like many others, without any notice of cotemporary historians. Of the circumstances from which it proceeded, a probable conjecture seems to be the utmost that can be attained.

The small barons, or vassals, who, exclusive of the nobility, held their lands of the crown, and those who held them of a subject-superior, were separate orders of men, who originally, by their situation, were removed to a great distance from each other. As members of the community, they appeared to be distinguished most remarkably in two respects. The vassals of the crown sat in parliament: those of a subject-superior were members of his baron-court. The former were liable for aids, and from the other feudal incidents, to the king: the latter were bound, for similar duties, to their inferior liege lord.

But these distinctions, arising from the feudal policy, continued no longer than while that system remained in its vigour. After the reign of Edward the first, the small barons, having ceased to attend in parliament, otherwise than by representatives, were at length understood, unless when particularly called by

the king, to have no more a seat in that assembly than the vassals of a subject-superior.

With respect to the feudal incidents, great alterations, in the course of time, were also produced. The demesnes of the crown, together with the extraordinary aids, and other incidents, drawn from the crown-vassals, were the only original funds for supporting the expence of government. But when the charges of the public, in consequence of the gradual advancement of society, had from time to time been increased, these funds became at length insufficient; new supplies were demanded by the king; and after stretching as far as possible the ancient duties of the crown-vassals, it was found necessary to levy an assessment upon all the proprietors of land, without considering whether they held immediately of the king, or of a subject. The greater part of the public burdens came thus to be imposed upon the nation at large; and the casual emoluments, which the crown derived from its immediate vassals, became, in proportion, of little importance.

In this situation, there was no longer any essential difference between the small pro-

prietors of land, who held immediately of the crown, and those who held of a subject. Neither of them had any right, in their own persons, to sit in the house of commons. Both of them, according to the later notions of property, had the same full power over the respective estates which they possessed; and the estates of both were equally subject to the taxes imposed upon the counties. Both of them, therefore, were equally beholden to the knights of the shires, by whose consent those taxes were imposed, and who had it in their power to secure either the one or the other from oppression. As those two classes of men thus reaped an equal benefit from the service of the knights of shires, it became reasonable that they should contribute jointly to the expence with which that service was attended; and if they joined in maintaining the county representatives, it was no less equitable, that they should have a voice in their election. If they submitted to the burden, they could not decently be excluded from the privilege.

By this relaxation of the feudal system, the foundation of the house of commons was en-

larged; and its establishment was rendered more extensively useful. The knights of the shires became properly the representatives, not of one class, but of the whole gentry of every rank and description. All the independent property in the kingdom was, according to this constitution, represented in parliament: the lords appeared in behalf of their own possessions; the inferior landed interest fell under the care of the county members; and the burgesses were entrusted with the protection of that wealth which was employed in trade.

Such, in all probability, were the circumstances, from which the rear-vassals obtained a share in the election of county-members; but at what time this change was produced is very uncertain. Mr. Hume has concluded, that it took place in consequence of an act of parliament in the reign of Henry the fourth. But when we examine that statute, it does not appear to have introduced any such regulation: on the contrary, it supposes that proprietors of land, not holding directly of the crown, had been formerly entitled to vote for the county-members; and makes a general provision for

securing the freedom of their election, as well as for preventing undue returns by the sheriff *.

A late respectable historian, notwithstanding all the light which has been thrown upon the subject in the present age, declares it still to be his opinion, not only that the knights of counties were coeval with the existence of the English parliament; but that, from the beginning, they were chosen, as at present, in a joint meeting of the rear-vassals, and those who held immediately of the crown †. The former part of this opinion has been already examined. With regard to the latter, it is totally inconsistent with the original plan of the feudal government. But what puts the matter beyond all possibility of doubt, is, that in Scotland, whose constitution, from a similarity of circumstances, as well as from imitation, is extremely analogous to that of England, but who, from the slow progress of arts, has retained a number of her primitive regulations; in Scotland, the original practice has been in-

* 7 Henry IV. c. 15. See a farther provision to the same purpose, 11 Henry IV. c. 1.

† See Lord Lyttelton's History of Henry II.

variably continued; and, from the first introduction of county-representatives to the present day, no person who does not hold his lands immediately of the crown, whatever be the extent of his property, has ever been permitted to vote in a county election *.

When a number of crown-vassals had been excused from personal attendance in parliament on account of the smallness of their fortunes, it might have been expected that some rule would be established, concerning the precise extent of property which gave a title to this concession; and that an exact line of partition would thus be formed between the small barons, or *gentry*, and the great barons, or *nobility*. It appears, however, that no such regulation was ever made. The liberty of absence enjoyed by particular members of parliament, seems to have depended, at first, upon the mere will of the sovereign, who never thought of restraining himself with regard to the terms upon which he granted this indulgence. To procure this liberty was the aim

* Holding of the prince of Wales, is in Scotland viewed in the same light with holding of the king.

of by far the greater part of the crown-vassals; as to prevent the unreasonable extension of it was the great object of the king; and the exemption was, by custom, established in favour of individuals, before any precautions had been suggested for ascertaining its boundaries *.

The want of a general rule to define the limits, in point of property, between the *small* and the *great* barons, appears to have produced an irregularity in this part of the constitution. Those crown-vassals whose attendance in parliament had been dispensed with, continued ever after to be excluded from that assembly, and their posterity remained in the same situation, however great the fortune which they might happen to acquire. On the other hand, those opulent barons who continued, in their own right, to sit in parliament, after the time

* It seems at one time to have been intended by Edward I. that personal attendance in parliament should be required from every landed proprietor, whose yearly rent was above 20l. This was the rule prescribed to the sheriffs of counties, in summoning the crown-vassals to an assembly held in the eleventh of that king's reign. This was also the extent of property in Scotland, which distinguished the *great* barons, or those, who were "*constrenzied* to come to the parliament or general council." Parl. 1457. c. 75.

of Edward the first, retained for the future their seat in the house of peers, notwithstanding all the vicissitudes of their fortune, and whatever might be the degree of poverty to which they were afterwards reduced. Property, the natural source of influence and authority, was, in this manner, detached from political power; while indigence, the parent of servility and dependence, was often invested with privileges which he was not qualified to exercise. The former inconvenience might, in particular cases, be removed by the interposition of the sovereign; who could, at pleasure, create any commoner a member of the house of peers: but the latter admitted of no remedy; since a peer, who had squandered his estate, could not, unless he committed a crime, be deprived of his rank; and since by that rank he was excluded from the usual means of repairing his fortune *.

As there was no regulation concerning the

* There occurs, in the reign of Edward IV. an act of parliament, declaring, in the case of George Nevil, duke of Bedford, that his title of honour, as a duke, was void and extinguished, in respect of his poverty, by which he was incapable of supporting his dignity.

greatest extent of property, from which a baron might be excused from attending in parliament, so there was originally none, with respect to the *least*, which entitled him to vote for a county-member. All the crown-vassals whatever, whose personal attendance was dispensed with, had of course a title to choose representatives, and were bound by their joint contribution to defray the expence of maintaining them*. But when landed property had undergone so much division, that the possessions of many individuals were become extremely insignificant; more especially after the rear-vassals had been joined with those who held immediately of the crown, in voting for the county-members; the poorer sort of proprietors endeavoured to excuse themselves from contributing to the support of national representatives; and, upon being relieved from that burden, had no longer a pretence for interfering in their election.

* With respect to the contribution laid upon the counties for maintaining the members, see Madox *Firma-burgi*. It was at first levied by the king's writ; and afterwards by act of parliament, from the time of Richard II. See 12 Rich. II. c. 12.

By an act of parliament, in the reign of Henry the sixth, it is provided, that the knights of shires shall be chosen by persons residing within the same county, and possessed of lands or tenements, of which the yearly rent, free from all charges, amounts to forty shillings*. By another statute, in the same reign, it is declared, that the voter shall have this estate within the county where the election is made†. Mr. Hume is of opinion, that forty shillings, at that time, making allowance for the alteration in the weight of the coin, and in the price of commodities, was equivalent to near twenty pounds of our present money.

According as parliament had occasion to determine a greater variety of questions, had attained more experience in discussing the business which came before it, the forms of parliamentary procedure became an object of greater attention, and received as we may easily imagine, a variety of improvements. The appointment of a president, in order to prevent confusion in delivering opinions, to declare the

* 8 Henry VI. c. 7. † 10 Henry VI. c. 2.

result of a debate, and even, in some measure, to direct the method of handling any question, was a step so necessary in a numerous meeting, that we meet with it as far back as there are any records of the English national council. The lord high steward, as I formerly took notice, was anciently the person who, in absence of the king, presided in that assembly; and when that officer no longer existed, the chancellor, who then rose to the chief consideration in the king's household, was commonly entrusted with this department. After the division of parliament into two houses, this officer continued in most cases to preside in the house of peers; but in that of the commons, whose deliberations were totally separate, another president became necessary.

From the primitive situation of the commons, who, in all cases, were instructed how to act, they had no opportunity of debating upon any subject; but they required a person to intimate their determinations to the king; and for this purpose they, at first, elected a *speaker*. The farther the business of that house was extended, the more they ventured to form resolutions without the advice of their con-

stituents; their power and privileges of their speaker were enlarged in proportion, and he at length obtained the province of an ordinary president. The first election of this officer, upon record, occurs in the first parliament of Richard the second. From the influence and dignity acquired, in that reign, by the commons, their speaker was exalted to an eminent station; and the persons who enjoyed the office became so conspicuous, as to attract the attention of the public.

One of the principal branches of business which fell under the consideration of parliament was legislation. The first method of conducting a measure of this kind was by a petition from parliament addressed to the king, setting forth some particular grievance or inconvenience, and requesting that it should be removed. To the king belonged the direction both of the executive and judicial powers; and, agreeably to the spirit of a rude age, he was originally under no restraint in the exercise of his prerogative, farther than what might arise from his apprehension of incurring the public displeasure. By a statute it was proposed to limit the former discretionary power of the

king, and, out of respect to his dignity, any proposal to this effect was made in the form of a request, that he would consent to the intended regulation. As every new law was, in fact, an innovation of the ancient establishment, it required the agreement of all parties concerned; that is, of the national assembly, including virtually the whole people, and of the king, whose power was to undergo a limitation. When the petition, therefore, had passed the two houses, and had obtained the consent of the king, it became an act of the legislature.

The petitions which had thus been granted, during the course of a parliament, were afterwards digested into the form of a statute: and, as the execution of this task required a degree of legal knowledge, it was devolved upon the principal judges of the kingdom. From the observation, it is said, that mistakes and abuses were committed in a matter of such importance, it was provided, in the reign of Henry the fifth, that the statutes should be drawn up by the judges before the end of each parliament; and, in the reign of Henry the sixth, the present mode of presenting bills to parlia-

ment already digested in the form of a statute, was first introduced*.

For some time after the introduction of the commons into parliament, no notice was taken of them in the character of legislators. The burgesses who composed the first house of commons, were not regarded as the advisers of the crown; and if on any occasion they were capable of extorting a redress of grievances, it was merely by creating an apprehension that they might refuse the supply which was demanded from them. In the beginning of the reign of Edward the third, the commons are mentioned in the character of petitioners; and the statutes are said, in the preamble, to have been ordained "at the request "of the commonalty of the realm, by their "petition made before the king and his coun-"cil in the parliament, by the assent of the "prelates, earls, barons, and other great men "assembled at the said parliament." The union of the knights of shires, in the same house with the burgesses, contributed quickly to bestow a deliberative voice upon the aggregate body of the commons; and in the reign

* See Blackstone's Commentaries,

of Richard the second, we find them interfering in public regulations of the highest importance*. In digesting the statutes, however, the old stile was continued, until the reign of Edward the fourth; when laws are said to be established *by the advice and consent of the lords, at the request of the commons, and by the authority of the same parliament*†.

From the primitive method of conducting bills for a new law, in the form of a petition to the king, was derived the custom that they should take their origin from parliament, and that the king should give no opinion concerning them, till they had been approved of in that assembly. As the king had no inclination to limit his own discretionary powers, it was never supposed that a bill for that purpose would be suggested by the crown. All that could be expected from the sovereign, in a matter of this nature, was, that he would be graciously pleased to comply with the desires of his people, communicated to him by the national council: and when a bill had come to be agitated in parliament, it was not yet

* See Gurdon's History of Parliament.

† See the preamble to those statutes.

considered as the request of the nation, and could not, therefore, be regularly presented to the king, for the royal assent, before the two houses had given their authority for that measure.

Such was the original foundation of a maxim, which is now regarded as one of the main pillars of the British constitution; that the king's negative upon bills shall not be interposed, until they have undergone the final discussion of the two houses of parliament; and, as a consequence of this, that he shall not take notice of any bill depending in parliament, until it shall be communicated to him in the usual and parliamentary manner. The effect of this maxim, in supporting the democratical part of the government, is now universally admitted; but that it was dictated by a regard to the interest of the people, or from the view of increasing their weight in the exertions of the legislature, there is no reason to believe. It is probable, on the contrary, that the form of procedure above mentioned was thought advantageous, or at least respectful, to the sovereign; as it prevented his being troubled with solicitations to limit his power,

until there was an immediate necessity for it. But in reality, this method of conducting the deliberations of the legislature, was not the fruit of any pre-conceived system of policy, nor the result of any claim of right, either upon the part of the king, or of parliament; it arose merely from the nature of the business under consideration, which was most conveniently brought to an issue in that manner; and, as this gave rise to a practice, which was observed with some degree of uniformity, so, in the revolution of ages, the ancient usage, whose utility became daily more observable, was invested with complete legal authority.

It merits attention, however, that what has been observed, concerning the method of ordinary legislation, is not applicable to the imposition of taxes. As the effect of a statute was to ascertain and determine the behaviour of the king, and consequently implied a privilege gained by the people; that of taxation was to bestow some emolument upon the crown, and to lay a correspondent burden upon the nation. An opposite course, therefore, was followed in those two branches of government. The people were understood to be the

prime movers in the former; the king, in the latter. The proposal for a new law proceeded upon a petition from parliament to the crown. The proposal for a new tax proceeded upon a request or solicitation of the crown to parliament. Each of these parties having something to bestow which the other wanted, they both became coy and reserved in their turn, and, by their address and perseverance, were enabled to extort reciprocal advantages. When the king was in want of money, he offered his consent to beneficial regulations, upon condition that certain taxes were imposed. When parliament were about to grant supplies to the crown, they took advantage of its necessities, and, as a preliminary article, stipulated the redress of grievances.

Upon this principle, that taxes are granted by parliament, at the desire of the king, is founded a rule, at present, "that the house "of commons shall receive no petition for "any sum of money relating to the public "service, but what is recommended from "the crown." And when a money bill is offered to that house, it is necessary, that the chancellor of the exchequer, or some other

officer of the crown, should declare, " that his " majesty having been informed of the con- " tents of the said bill, recommends the same " to the consideration of the house*." After this preliminary step, a bill for the imposition of taxes is conducted in the same course, and passes through similar stages, with every other matter which comes under the determination of the legislature.

* See Hatsell's Proceedings in the House of Commons.

CHAPTER VII.

Alterations in the State of the ordinary Courts of Justice.

THE reign of Edward the first is no less distinguished by institutions of great importance relating to the distribution of justice, than by those which have been mentioned with regard to the legislative authority; and in both these particulars we may trace back to this period, the introduction of that regular system which we at present enjoy. The chief of those institutions respecting the exercise of the judicial power, and some of the most remarkable consequences with which they were attended, we shall proceed to examine.

SECTION I.

Establishment of the Courts of Common Law, at Westminster.

THE *aula regis*, which, after the Norman conquest, had risen by degrees out of the high

court of parliament, was productive of great advantages, by facilitating the distribution of justice. A full meeting of parliament could not be obtained, unless upon singular occasions; but this tribunal, consisting of a small number of judges, and these commonly attending the king's person, could easily be held upon any emergency, and was ready to take cognizance of every complaint.

Although the institution of the *aula regis*, however, was, at the time of its introduction, accommodated to the infant state of improvements in the country, yet, in a subsequent period, when those improvements were advanced to greater maturity, and when the authority of government was better established, its interpositions became not only defective, but liable to many inconveniencies. For some time after the Norman conquest, the investigation of law-suits, although requiring a degree of attention unknown to the preceding ages, was not so tedious as to prevent their being commonly decided in the neighbourhood of the place in which they had been commenced, But when the advancement of law and government had farther multiplied the legal dis-

putes among the members of society, as well as the forms of judicial procedure, such a quick dispatch of the business was no longer practicable; and, as the court had no fixed residence, but followed the king, wherever the political state of the kingdom required his presence, it was frequently necessary that causes should be decided in a part of the country very remote from that in which they had arisen. The circumstances of this ambulatory court became thus inconsistent with the leisure and deliberation requisite for judges in forming their decisions; and still more incompatible with the interest of parties, who, in many cases, were obliged to attend the court from place to place, and sometimes, before they could obtain a final sentence, to travel over a great part of the kingdom. This attendance was rendered more expensive and burdensome, from the gradual advancement of law, as a science; which tended to promote the employment of lawyers, as well as other retainers of judicial controversy; and which, by contributing to encourage the fullest and most ample discussion of every plea, laid parties frequently under the

necessity of calling a number of witnesses in support of their several averments.

It was to be expected, therefore, that, according to the general improvements of the country, the attention of government would be directed to the removal of these inconveniencies; by rendering the *aula regis* a stationary court, or at least by appointing, that it should hold regular meetings at particular places.

While the natural progress of improvement in the kingdom appeared to require this alteration in the state of the principal tribunal, the increase of judicial business had likewise a tendency to distinguish different branches of jurisdiction, and to place them in the hands of different judges. The prosecutions carried on against atrocious offenders, to satisfy public justice, and to prevent the future commission of crimes, came to be viewed in a different light from private controversies concerning property, and the various rights and obligations which occur among individuals. Lawsuits of the former sort, or *criminal actions*, are usually much less numerous than those of the latter, which have received the appellation of

civil actions. The trial of a crime is apt to be terminated in a more expeditious manner, than a civil process. Those heinous offences, which are supposed to require a prosecution at the instance of the public, excite, for the most part, a general indignation in the minds of men, who are therefore disposed to call for a speedy vengeance upon the criminal. In many of those offences, besides, it is necessary, that, before a prosecution is commenced, the person suspected of the crime should be arrested and imprisoned, in order that, if guilty, he may be prevented from escaping a trial; and the hardships to which he is thus unavoidably subjected, together with the difficulty of securing his person, afford additional reasons, from expediency, as well as from justice, for bringing the action against him to a speedy conclusion. To all these peculiar circumstances, we may add, that the laws of a country, respecting the punishment of crimes, are usually plain and simple; so that, in prosecutions of this nature, the judge can seldom have any farther difficulty, than what arises from the investigation of the fact.

Law-suits about private property are in a different situation. A cool spectator feels himself but little interested in such disputes; and it seems reasonable that the parties should be left, in a great measure, to their own discretion, in bringing the business to an issue. As in such differences there is no reason to suspect that either party will endeavour to escape from justice, no imprisonment of either is necessary. The laws, too, relating to the civil rights of mankind, are apt to become so numerous and intricate, as may occasion great hesitation and embarrassment in applying them to particular cases. These peculiarities, by multiplying the pleadings of parties, as well as the delays of court, and by introducing peculiar forms of procedure, have contributed to distinguish a civil from a criminal action.

To these two species of law-suits may be subjoined a third, arising from disputes between the king and the people, in matters of revenue. Such law-suits are calculated to interest the public, at least the crown, like a criminal trial; at the same time that they are strictly of a mere pecuniary nature. Though

the public revenue of a state is really the property of the community, yet, in a monarchical government, the sovereign, who has the immediate disposal of that revenue, and who reaps more benefit from it than any other individual, is likely to consider it as his own patrimony, and to become particularly attentive to the support and encouragement of those judges by whom it is made effectual.

Thus, in every kingdom which is advancing in improvement, the same division of labour which takes place in the arts becomes also convenient in the conduct of law-suits; and, upon the same principle which gives rise to separate trades and professions, the province of distributing justice will be divided, and appropriated to a number of distinct judicatures.

These two objects, the fixing the residence of the *aula regis* to a particular place, and the division of the powers with which it was invested, had not been entirely overlooked by the English, before the time of Edward the first From what has been already observed, it is evident, that an ambulatory court is less qualified for discussing a civil than a criminal

action. From the multitude of civil, in comparison of criminal causes, such an unsettled tribunal is attended with more inconvenience to the judge; from the greater length of time required in their discussion, it is more burdensome to the parties.

We accordingly find, that, by a clause in the great charter of king John, an improvement was made with respect to the exercise of civil jurisdiction; a court of *common pleas* was detached from the ancient *aula regis*, and was appointed, for the future, to have a permanent residence*. The making this an article in that great transaction between the king and his nobles, is a proof that a regulation of this nature was thought of the utmost importance; and that the want of it, in former times, had been a ground of general complaint. The new court of common pleas, which was thus erected, and held by separate judges, appears to have been deemed inferior in rank to the criminal court, held by the grand justiciary, and in which the king continued sometimes to sit in person.

* "Communia placita non sequantur curiam regis, sed "teneantur in aliquo loco certo."

For this reason, the latter court was permitted, in certain cases, to review the decisions of the former*.

Even at an earlier period, the *aula regis*, when acting as a court of revenue, had been so far distinguished as to have a separate *president;* that officer who had the charge of the public treasury†.

At last, in the reign of Edward the first, these changes were completed: the court of the grand justiciary was entirely abolished; and three permanent courts were established at Westminster; a court of king's bench, to have the cognizance of crimes; a court of common pleas, to determine civil causes; and a court of exchequer, to decide in matters of revenue. As the jurisdiction committed to these three tribunals was totally different, they had, each of them, a separate place of meeting, a different president, and were composed of different judges.

There is ground to suppose, that the jealousy entertained by the king, of that great officer

* See Blackstone's Commentaries, Book III.

† Baron Gilbert's History of the High Court of Chancery. Dialogus de Scluccario.

who presided in the *aula regis*, co-operated with the natural course of things in abolishing this court, and in producing the institutions which came in its place. The office of the grand justiciary was originally an appendage of that of the lord high steward; who, in all the feudal kingdoms, was the chief officer of the king's household, and the person next in power and dignity to the sovereign. As an employment of such high importance was naturally claimed by one of the greatest of the nobility, so his remaining in the possession of it could not fail to augment his opulence and authority. It was the same officer in France, who, at an early period, found himself in a condition to dethrone the Merovingian race of kings, and to establish the crown in his own family. We need not wonder, therefore, that Edward, a prince of equal policy and activity, and who had been successful in extending the regal authority, should be desirous, at the same time that he improved the judicial establishments, of putting an end to the existence of a minister, of whose designs he might be apprehensive, and whom he found it difficult to retain in subjection. The chief justice, who

presided in the new criminal court, was considered merely in the light of a judge, without any share of public administration.

In this, as well as in other branches of government, the history of modern Europe exhibits a remarkable uniformity; accompanied, however, with certain varieties, the effect of accidental circumstances. The *cour de roy* in France, which, like the English *aula regis*, had grown out of the national council, and which was likewise an ambulatory court, was at length productive of similar inconveniencies to those felt in England; and it was thought proper to remove them by giving a permanent residence to this tribunal. By an ordinance, in the reign of Philip the Fair, a branch of the *cour de roy* was fixed at Paris, and another at Thoulouse*; to both of which the name of parliaments was given. Other courts of the same nature were afterwards added in different districts, or had arisen in provinces which came to be reduced under the French monarchy; so that the whole kingdom, instead of being placed, like England, under one set of great tribunals, re-

* In the year 1302.

maining in the capital, was divided into a number of separate territories, in each of which there was a particular court, invested with a supreme and independent jurisdiction. The multiplication of law-suits in any of those courts occasioned a subdivision of its members into different *chambers*, among which the different sorts of judicial business were distributed.

The *aulic council* in Germany, as I formerly observed, was, in like manner, an ambulatory court, which had arisen from the diet of the empire; but, from the slower improvements of that country, or perhaps from the decline of the imperial dignity, the attempts of the German legislators, to correct this inconvenient mode of distributing justice, occurred at a much later period. In the year 1495, and the reign of the emperor Maximilian, was formed the *imperial chamber*, a new and stationary court, with similar powers to those of the aulic council. But, as this latter tribunal was not abolished, the German empire has come to be provided with two distinct judicatures, the one ambulatory, the other with a

fixed residence, which have, in the greater part of causes, a concurrent jurisdiction.

In Scotland, the *aula regis*, both in its original constitution, and in its powers, was perfectly similar to the court of the same name in England; and, from similar motives of convenience, it was afterwards broken into the different courts, of the session, the exchequer, and the justiciary; corresponding to the distinction of civil, fiscal, and criminal causes; and these tribunals came, at length, to have a regular establishment in the capital.

In considering the policy of the judicial institutions, in modern Europe, those of England and France, the two most powerful nations, appear to merit particular notice.

In France, the establishment of a number of parliaments, or supreme tribunals, in different districts throughout the kingdom, has the manifest advantage of diminishing the expence of litigation, by bringing the distribution of justice near the residence of the different inhabitants; an advantage which is farther improved, by the appointment of subordinate courts, held by the *lieutenant civil* and *criminal*, within the district of every superior judicatory.

The independence of these great tribunals has, on the other hand, a tendency to produce inconsistent and jarring decisions. The districts belonging to the different parliaments may, so far as the interpretation of law, and the opinion of the judges, are concerned, be considered as in the state of separate kingdoms; having, in the ordinary operation of government, no means for securing uniformity of conduct. This, no doubt, is one great cause of the diversity of laws and customs, which, notwithstanding the general influence of civilized manners, is to be found at present in different parts of the French monarchy.

To remove this inconvenience, an extraordinary measure is, in some cases, adopted. The king, who is the fountain of justice, nominates, at pleasure, any number of persons, to receive an appeal from the decision of any particular parliament: and in this way, the members of one parliament are sometimes appointed to review the sentence of another. But this is a partial remedy, which cannot be effectual to prevent all discordance in the judgment of those different courts. In a few instances of gross absurdity, or flagrant in-

justice, the interposition of the sovereign may be procured; but it is impossible that he should give attention to the ordinary course of decisions, through the whole extent of his dominions, and restrain the numberless varieties and inconsistencies which are introduced into the common law of the country.

The judicial establishments of England are totally free from this inconveniency. As the principal courts have a jurisdiction over the whole kingdom, the principles of law, in every department, being determined by the same set of judges, are reduced to an uniform standard. As these courts have, besides, a fixed residence in the neighbourhood of each other, it was easy for them to communicate their opinions; and hence, in order to secure the propriety of their decisions, it became customary, in matters of great difficulty, depending before any one court, to refer the decision to a meeting composed of the judges of all the three courts. With the same view, it was provided by a statute in the reign of Edward the third, that the decisions of the court of exchequer may be reviewed by a court consisting of the judges of the king's bench

and common pleas, with the assistance of certain officers of the crown; and by another statute, in the reign of Elizabeth, that certain proceedings of the king's bench may be reviewed in a joint meeting of the justices of the common pleas and the barons of the exchequer.

The system of English jurisprudence has become what might be expected from this general plan of the English tribunals. There seems to be no country in the world where the lawyers and judges are so strongly impressed with a notion of the advantages derived from uniformity and stability in the rules of law. That a certain rule should be established, and invariably maintained, is justly esteemed of more consequence, than that the rule itself should be the most perfect imaginable. Almost any regulation whatever is preferable to fluctuation and uncertainty. To such an extreme, it should seem, has this principle been carried in England, as to have produced a maxim, that when any point has once been decided in a judicial controversy, or has even been settled by the opinion of any lawyer of good authority, it shall be regarded as not

liable, on any future occasion, to be altered or disputed.

But the English tribunals, according to the plan above mentioned, were calculated to render litigation expensive and troublesome, by giving to the capital a monopoly in the distribution of justice. The inferior judicatories, those of the baron in his own demesne, and of the sheriff in each county, had, upon the advancement of the *aula regis*, been so far reduced as to retain only the cognizance of petty crimes, and the determination of civil actions below the value of forty shillings. These, therefore, could be of little service in settling disputes, and restraining injustice throughout the kingdom; and, as no intermediate courts were provided, the most part of law-suits, both in civil and criminal matters, and whether of small or of great importance, could only be decided by the courts of Westminster-hall. In a country so extensive, as England, a great proportion of the inhabitants were thus removed to a great distance from the seat of justice, and laid under many disadvantages in making their rights effectual.

To supply this deficiency in the ordinary establishment, the king appointed certain extraordinary judges, as auxiliaries to those of the capital, for the purpose of circulating the administration of justice through every corner of the kingdom.

Although the distant residence of individuals from the seat of justice is, in all cases, inconvenient, it is more so in criminal than in civil actions. It seldom happens that a crime can be proved in any other manner than by parole evidence; for a criminal does not usually act with so little caution as to afford a written document of his guilt; neither is it competent to demand his oath concerning the truth of the facts with which he is charged. But of all the methods of proof, that which requires the attendance of witnesses, more especially when they must be conveyed from distant parts of a country, is necessarily the most expensive and burdensome. In the view of public utility, it is likewise expedient, that every criminal trial should be conducted, and that the punishment of the offender should be inflicted, as much as possible, in the neighbourhood of the place where the crime has

been committed. The chief object in the punishment of crimes is to preserve the peace and good order of society, by deterring others from following the example of the criminal; and this is most effectually obtained, when the same persons who have beheld the violation of the law, are also spectators of the terror, mortification, and misery, with which that violation is attended.

From these considerations, when the king's bench came to have its usual residence at Westminster, the sovereign was induced to grant special commissions, for trying particular crimes, in such parts of the country as were found most convenient; and this practice was gradually modelled into a regular appointment of certain commissioners, empowered, at stated seasons, to perform circuits over the kingdom, and to hold courts in particular towns, for the trial of all sorts of crimes. These judges of the circuit, however, never obtained an ordinary jurisdiction; but continued, on every occasion, to derive their authority from two special commissions; that of *oyer and terminer*, by which they were appointed to hear and determine all treasons, felonies, and misdemea-

nors, within certain districts; and that of *gaol delivery*, by which they were directed to try every prisoner confined in the gaols of the several towns falling under their inspection. Thus, by the addition of an ambulatory court, in supplement of another which has a fixed residence, precautions are taken to prevent the various and opposite inconveniencies incident to the distribution of criminal justice; and, as far as human institutions are capable of attaining perfection, the most complete establishment seems to be made for the trial and punishment of crimes.

The appointment of the circuit judges, in order to facilitate criminal trials, naturally suggested the idea, that the same commissioners might assist the courts at Westminster in another department, and be made subservient to the more expeditious decision of civil causes. With this view the commission of *assise*, and that of *nisi prius* was granted to these judges. By the former they were empowered to take the verdict of a jury in the trial of landed disputes. The latter was intended to shorten the procedure in ordinary civil actions, by directing the judges in the circuits to investigate

all such matters of fact, as were then under dispute before any court of Westminster-hall*.

What is commonly an article of the greatest magnitude, even in a civil process, the proof of the different averments made by the parties, came thus to be discussed within the county, and frequently in the very neighbourhood of the place where the dispute had arisen; while the mere matter of law was left to the consideration of the great court at a distance; a court, from its permanent situation, as well as from its authority and dignity, the best qualified for deciding points of such difficulty and importance.

To these regulations, of such manifest utility, there was added a further provision for maintaining the general tranquillity. When quarrels arose among individuals, when outrage and violence were committed, and these were likely to be followed by riots and insurrections, it was in vain to expect, that, by application to the ordinary courts of justice, a timely interposition could be procured for sup-

* See Blackstone's Commentaries. Hawkins's Pleas of the Crown.

pressing such disorders. It was expedient, therefore, that men of rank and character, living in the different parts of the country, and who might, of consequence, be at hand upon any emergency, should be invested with sufficient authority to seize disorderly persons, to put them under confinement, and, in general, to prevent violations of the public peace.

We find accordingly, that, by the ancient law of England, *conservators of the peace*, with powers of that nature, were, in the different counties, elected by the freeholders; and the same powers were also annexed to many of the higher offices of government. It appears that those magistrates had originally no cognizance of crimes, but merely an authority to secure offenders, in order to their trial before the ordinary tribunals. We may easily conceive, however, that such an employment would lead to a species of jurisdiction. When a person has been guilty of a breach of the peace, his conduct, although deserving animadversion, may often be unworthy of the trouble and expence which would attend a trial before the ordinary courts; and if, in such a case, the

magistrate, who has taken the offender into custody, and who must, in some measure, have already examined the case, should proceed of himself to inflict a moderate punishment, the expediency of such a measure would afford its justification, or at least would induce the public to connive at so small an extension of authority.

In the reign of Edward the third, the appointment of those magistrates, as might be expected from the rising state of the prerogative, was transferred to the crown; at the same time that they were invested with a power of trying all offences excepting those which inferred a capital punishment*. From this period they acquired the appellation of *justices of the peace*. By subsequent regulations they came to be intrusted with various branches of civil jurisdiction; by which they were enabled, in many questions of importance, to supersede the interposition of the superior tribunals.

Although, in Scotland, the principal courts of law were established in the capital, upon

* By 18 and by 34 Edward III. the justices of peace are empowered to determine felonies and trespasses; but in practice their jurisdiction is restricted to such felonies as are within the benefit of the clergy. See Hawkins.

the same plan as in England, the inhabitants were not subjected to the same inconvenience by their distance from the place where justice was administered. To say nothing of the narrowness of the country, compared with England, the Scottish nobles maintained their authority much longer than the English; and the courts of the baron, and of the sheriff, were therefore enabled to preserve a great part of their original jurisdiction. As these tribunals had the power of determining both civil and criminal actions, in their several districts, there was no necessity for bringing such matters in the first instance, before the superior courts in the capital; and upon this account, although the judges of the court of justiciary were empowered to make circuits over the country, as in England, there was no occasion for bestowing upon them any civil jurisdiction, corresponding to what arises from the English commission of *nisi prius*.

The appointment of justices of the peace, to supply what is defective in the jurisdiction of the ordinary courts for suppressing riot and disorder, was introduced into Scotland at a later period, but in a similar manner, and upon the same footing, as in England.

SECTION II.

Of the Petty Jury—and the Grand Jury.

FROM the progressive alterations, which have been mentioned, in the English courts of justice, it is natural to conclude, that the judges were continually advancing in experience and knowledge, and that the forms of judicial procedure were daily attaining higher degrees of perfection. Of all the institutions relative to the management of judicial business, which may be considered as the effect of that improvement, those of the *petty jury*, and the *grand jury*, are most deservedly the boast of English jurisprudence; and as, in the period which we are now examining, both of them appear to have arrived at their complete establishment, a review of the circumstances from which they proceeded, and of the steps by which they were introduced, may not be improper.

I. I had formerly occasion to observe, that, under the government of the Anglo-Saxon princes, the chief magistrates of the several

counties and hundreds, found it unnecessary, in the determination of law-suits, to call a full meeting of the courts over which they presided; and, for the greater dispatch of the business, as well as for the ease and convenience of the people, were accustomed to select a certain number of the freemen, or allodial proprietors, in each particular cause, to assist in giving a decision. Hence the first idea of the *petty jury* was probably suggested.

In a subsequent period, a similar practice was adopted in the courts of a barony. When the vassals of a superior had acquired hereditary fiefs, they were no longer under the necessity of submitting to his arbitrary will; and in regulating their conduct, as well as in distributing justice among them, he found it expedient to act with their advice and concurrence. To have assembled the whole of his vassals, for the determination of every law-suit, would have been too great a hardship upon them; but a moderate number were convened, in order to satisfy the parties, and to give weight and authority to the sentence.

The calling, occasionally, a number of the vassals, in each case, to assist the superior, was

a more natural expedient, than the appointment of certain permanent assessors. It was attended with no trouble or expence; for every vassal was bound not only to fight for the superior, but also to perform such other services as might be requisite, in order to support his authority and dignity. According to the simple notions of that age, these persons were sufficiently qualified to determine the points referred to their decision; more especially as they might receive advice and direction from the magistrate. In some respects they were held even preferable to every other sort of judges; being men of the same rank and condition with the parties; and, from their situation, having frequently access to know the state of the controversy, as well as the circumstances of the facts in question.

The introduction of juries in the courts of a barony, arose from the establishment of hereditary fiefs; for, so long as vassals held their land precariously, or even were not secure of transmitting it to their posterity, they had too much dependence upon their superior, to dispute his authority, either in settling their differences or punishing their offences. We may

easily suppose, therefore, that, under the Anglo-Saxon government, this mode of procedure was not very common; because the custom of securing landed estates to the heirs of a vassal was then far from being general. It is from the reign of William the Conqueror, that we may date the remarkable extension of jury-trials; proceeding partly from the imitation of Norman or French customs; but still more from the completion of the feudal system, and the consequent multiplication of hereditary fiefs.

It merits attention, that this institution had been hitherto limited to the hundred and county courts, and to those of a feudal barony, but never had taken place in the judicial proceedings of the national council. The causes which came under the cognizance of the Witenagemote were not so numerous, as to create much trouble to its members, or to suggest the measure of devolving that branch of business upon any sort of committee, or partial meeting, in place of the full assembly.

Upon the establishment of the Anglo-Norman parliament, its ordinary judicial business

was, in a short time, committed to the *aula regis*; a court which at first consisted of several members, but was afterwards held by a single magistrate, the deputy judge of the sovereign. This tribunal was properly the ordinary baron-court of the king; and, being in the same circumstances with the baron-courts of the nobility, it was under the same necessity of trying causes by the intervention of a jury. As the vassals of the crown were usually more independent of the king, than the rear-vassals were of their immediate superior; it is not likely, that, while justice was administered by the *pares curiæ* to the latter, the former would submit to the decisions of a single magistrate, named at pleasure by the sovereign. We find, accordingly, that, by a general law in the reign of Henry the second, either party in a law-suit was allowed to decline the customary mode of trial by single combat, and to demand that his cause should be determined by an *assize* or *jury* of twelve persons. From this time forward, there can be no doubt that jury-trials were admitted in all the courts of ordinary jurisdiction. They are expressly re-

cognised and established by the great charters of king John, and of Henry the third*.

When the office of the grand justiciary was abolished, in the reign of Edward the first, and when the powers of the *aula regis* were distributed to the king's bench, the common pleas, and the exchequer, it was natural for these courts to follow the same forms of procedure which had been observed by that high tribunal to which they were substituted. The former practice of determining law-suits by a jury, was doubtless viewed, at the same time, in the light of a privilege, which the nation would not have been willing to resign. The number of judges, in each of the courts of Westminster-hall, was much inferior to that of the ordinary assize; and, as they were not men of the same rank with the parties, it was not likely that the same degree of confidence would be reposed in them. To have transferred the powers of an institution so popular as that of juries, to a set of courts constituted in this manner, would, notwithstanding the late advances of prerogative, have been a

* Magna Charta reg. Johan. c. 21. M. C. reg. Hen. III. c. 32.

dangerous measure. What is called the petty jury was therefore introduced into these tribunals, as well as into their auxiliary courts employed to distribute justice in the circuits; and was thus rendered essentially necessary in determining causes of every sort, whether civil, criminal, or fiscal.

In the high court of parliament, however, this method of trial was never admitted; being neither found requisite for the convenience of the members, nor conducive to the interest of parties. It was not requisite for the convenience of the members; because the trials which came before parliament were few, and speedily brought to an issue. It was not conducive to the interest of parties; because they were better secured from partiality and oppression, by a judgment of the whole house, consisting of all the crown vassals, than they could expect to be from a decision given by a limited number of those vassals, arbitrarily appointed by the president.

It has been questioned, whether an institution, similar to that of the petty jury in England, had place in any of the nations of antiquity. Among the Greeks and Romans, as

far back as we can trace the history of their judicial establishments, it does not appear that the inhabitants of certain districts were ever invested with jurisdiction, or that a part of their number were in each trial selected by the ordinary magistrate to assist him in giving a decision. The ordinary courts of Greece and Rome were composed of a chief magistrate, and of certain assessors; but these last were permanent officers, appointed, as it should seem, from year to year, or for the same period with the magistrate himself.

The Roman *judex pedaneăs*, indeed, was nominated for each trial; but he was originally no more than a commissioner for taking a proof of the facts in question; and, although he was afterwards empowered, in many cases, to determine the law, as well as the fact, the intention of his appointment was not to give weight and authority to the decision, but merely to relieve the magistrate and his assessors from a part of their labour.

Among the Gothic nations of modern Europe, the custom of deciding law-suits by a jury seems to have prevailed universally; first in the allodial courts of the *county*, or of *the*

hundred, and afterwards in the baron-courts of every feudal superior. The same custom, however, does not appear, in any European kingdom except England, to have been extended to those great courts, which, upon the advancement of civilized manners, arose out of the national council, and were invested with the principal branches of ordinary jurisdiction.

The *cour de roy*, in France, was not, like the court of the grand justiciary in England, reduced under the direction of a single magistrate; but consisted of an indefinite number of the same persons who sat in the national assembly. The parliament of Paris, formed out of the *cour de roy*, was likewise composed of as many of the nobles as chose to attend; with the addition of a body of lawyers, who, it was understood, were to direct the forms of procedure, and to take upon them the drudgery of the business*. The parliament

* Soon after the establishment of the parliament of Paris, the king dispensed with the attendance of the dignified clergy. The ordinary lay barons afterwards absented themselves, without any express dispensation; and there remained only the princes of the blood, and peers, who retained the privilege of attending that court on solemn occasions.

of Thoulouse, which was authorized at the same time, and the other parliaments which were afterwards formed in particular districts, conducted themselves upon the same principles with the parliament of Paris; and, as all of them were composed of a numerous council of judges, the intervention of a jury, to prevent erroneous judgments, or even to secure the parties from oppression, was the less necessary.

This observation is applicable to the principal courts of the German empire. The aulic council was composed of an indefinite number of the same persons who had a right to sit in the diet. The imperial chamber was a numerous council of judges. In both of these tribunals, therefore, the assistance of a jury was probably thought unnecessary.

In Scotland, the court of the grand justiciary came to be established upon the same plan as in England; and admitted, in like manner, the form of jury-trials. But upon the division of the powers of that court into different branches, the civil tribunal, then introduced, was a committee of parliament; that is, a committee of those crown-vassals of

whom juries had been composed. By one or two variations of that model, was formed the present court of session, which was made to consist of fifteen ordinary judges, the usual number of jurymen in Scotland; with a view, it should seem, to supersede the use of jury-trials: and as this mode of judicial procedure was laid aside in the principal civil tribunal, the example appears to have been quickly followed in the inferior civil courts of the kingdom. In the court of justiciary, however, which consisted of a small number of judges, and consequently in the inferior criminal courts, the ancient practice of jury-trials was continued.

Beside the circumstance now mentioned, relating to the constitution of the principal courts of justice in several European kingdoms, the influence of the ancient Roman law, as delivered in the compilations of the emperor Justinian, was another more general cause, which contributed to the disuse of juries through the greater part of Europe. Upon the revival of letters in Europe, that improved system of jurisprudence was recommended and propagated by the clergy; was taught,

under their direction, in almost all the universities; and its decisions and forms of procedure were considered by the civil magistrate as models for imitation. The Gothic institution of juries, which had been unknown to the Romans, was therefore brought more and more into discredit; and, that the whole cognizance of a law-suit should be committed to judges, who, by being set apart for that purpose, and by devoting themselves to this employment, might become peculiarly qualified for the exercise of it, was regarded as an improvement in the state of judicial policy.

In England, where, from circumstances that will be mentioned hereafter, the Roman system was less incorporated with the common law than in other countries, the custom of jury-trials has, accordingly, been most religiously maintained. But even in England, this custom has been totally excluded from ecclesiastical tribunals, from those of the two universities, and from all other courts in which, from particular causes, the maxims and principles of the civil law have been adopted.

Scotland was, in some degree, under the influence of opposite systems; and seems, upon

that account, to have held a middle course. Like the nations upon the continent, she was led into a close imitation of the Roman decisions and forms of procedure; while, by her vicinity to England, she was induced to borrow many regulations and customs from that more cultivated and powerful country. Thus the Scottish tribunals imitated the English, by retaining a jury-trial in criminal prosecutions; but followed the practice of the Romans, by neglecting that institution in the greater part of civil actions. In the former, it was natural to entertain a greater suspicion of the court than in the latter; because in a criminal trial, the king, who nominates the judges, and to whom they must look for preferment, is always a party; whereas, in a civil action, or controversy between private individuals, the crown has no interest; and there is commonly no circumstance to influence the magistrate upon either side, or lay him under a temptation to gross partiality.

It is not likely that the institution of juries would, in any country, be very acceptable to the sovereign; since it limited the power of those judges whom he appointed, and of whom

he had, in some measure, the direction. We may easily imagine, therefore, that, according as, among any people, the prerogative was exalted or depressed, its influence would be exerted, more or less effectually, in discouraging this mode of trial; and hence we may discover an additional reason for the continuance of juries in England. As the English were successful in reducing the power of the monarch within moderate bounds, and acquired proportionably higher notions of liberty; they became, of course, the more attached to that method of distributing justice, by which the disposal of their lives and fortunes was committed to their fellow-citizens, rather than to officers in the nomination of the crown. They became not only the more passionately fond of this privilege, which had been handed down to them from their ancestors, but at the same time the more capable of maintaining it. There is no reason, indeed, to believe that this circumstance alone would have been sufficient to retain, in England, the practice of jury-trials; for other European states have had also the good fortune to restrain the prerogative, and to establish a popular government.

But this circumstance undoubtedly co-operated, with the other causes formerly mentioned, in rendering the people of England more tenacious of that ancient appendage of the feudal policy, and more jealous of every attempt, from whatever pretences, either to limit the power of juries, or to exclude them from the decision of particular causes.

2. In order to secure the regular distribution of justice, it is not enough that courts are properly constituted, and that judges are attentive to the determination of law-suits. The magistrate must also be informed of those cases which require his interposition; and measures must be taken for bringing them under his examination. A distinction, however, in this respect, may be observed between that branch of judicial business which relates to civil, and that which relates to criminal causes. In a controversy between private individuals, each party is likely to prove sufficiently attentive to his own interest; and may therefore be left to vindicate his own rights as he shall think fit. But when a crime is committed, which requires a punishment for the sake of a public example, there is danger that

the interest of the community will be neglected; that no information of the fact will be given to the judge; and that no person will take upon him the trouble, the odium, and the expence, of bringing an accusation. It is here that some regulation is necessary, to prevent the disorders that might be apprehended, from permitting criminals to pass with impunity.

Among the Romans, not only the person injured, but any one of the people, was allowed to prosecute a public offence. As the crime was understood to affect the whole community, any one of its members, being in some degree a sufferer, was entitled, upon that account, to come forward and claim redress.

It requires but little sagacity to discover, that this mode of prosecution was liable to great abuses. It was likely, on the one hand, to produce negligence in prosecuting crimes; and, on the other, to encourage unjust and groundless prosecutions. Few people were found so public-spirited, as to undertake the disagreeable task of convicting criminals, from the view of promoting the interest of society, while many were tempted to become public accusers, from secret motives of resentment

or malice, or even for the purpose of obtaining a pecuniary composition from the person whom they had found an opportunity to prosecute. To prevent this latter enormity, severe penalties were inflicted upon such as brought an unjust accusation of a public offence. In particular, it was enacted, that he who failed in proving his accusation, should suffer the same punishment to which, if he had been successful, the defendant would have been subjected: a regulation which, if strictly enforced, must have put an end to every capital prosecution: for who is there that will hazard his own life, upon the uncertainty of prevailing in any criminal trial?

In the modern feudal nations, the judge himself was originally the public prosecutor. Every feudal lord, whether a sovereign prince or a subject, was excited to punish offences within his demesne; not only from the desire of repressing disorders, but also from that of procuring fines and amerciaments. As representing the community, of which he was the leader and executive officer, he first brought an accusation against those whom he suspected of crimes: as the chief magistrate, he after-

wards examined the proof, and gave judgment in the cause.

The mischief attending this practice must have soon become notorious. It can hardly be supposed that the same person would acquit himself with propriety in the twofold character of an accuser and a judge. Even in the course of a speculative debate, men usually acquire a prejudice in favour of those tenets which they are endeavouring to support; and find it extremely difficult to preserve a degree of candour in judging of such as are advanced upon the opposite side. What shall we say then of a person who is engaged in preparing a public accusation; who sets out with a strong suspicion, that the defendant is guilty; who converses with informers, likely to employ every artifice to strengthen that opinion; and who, to pass over his pecuniary interest, involved in the issue of the cause, has exerted himself in collecting and arranging all the facts and arguments in confirmation of his hypothesis? How is it possible to avoid that blind zeal and prepossession, that eagerness to convict the defendant, acquired in the capacity of a prosecutor; and to behave with that im-

partiality, coolness, and moderation, which are essentially requisite in the distribution of justice?

To prevent this dreadful enormity, and at the same time to secure a proper attention to the public interest, the prosecution of crimes was, in all the feudal countries, reduced into a separate employment by the appointment of a procurator or factor to act in the name of the sovereign. Hence the attorney-general in England, and the king's advocate in Scotland, were appointed to manage the judicial business of the crown, before the principal tribunals; and a similar institution, from the same views of expediency, was even extended to inferior courts.

But, previous to the prosecution of offences, there must be information of their existence; and frequently, too, the immediate interposition of the magistrate is necessary, to apprehend and imprison the offender. In a rude nation, however, especially if it is of considerable extent, many crimes are likely to be hid from the public eye, and to escape the examination of any court. It appears, accordingly, that, in modern Europe, this branch of police

had early become an object of general attention. To make inquiry concerning the commission of public offences, and to transmit an account of them to the criminal court, was one great purpose of the appointment of *coroners*; a set of officers who had place not only in England and Scotland, but in the greater part, if not in all, of the feudal kingdoms upon the continent.

The office of the coroners, in England, is of so great antiquity, that the commencement of it is entirely lost in obscurity. It seems to have been an immemorial custom of the Anglo-Saxons, that several persons of distinction should be named by the freeholders in each county, with power to secure and imprison criminals of all sorts, to the end that they might be brought to a trial. From this employment, these officers, as in after times the justices of the peace, found the means of assuming a criminal jurisdiction, which, from small beginnings, became gradually more and more extensive. Another branch of business, devolved upon the coroner, and which may be regarded as an appendage or consequence of the former, was that of ascertaining and deter-

mining the value of the fines, amerciaments, and forfeitures, or of any other emoluments, which accrued to the sovereign, either from the condemnation of public offenders, or from the right of the crown to all the goods, of which no other proprietor could be found.

When the coroner had occasion to inquire into the truth of any fact, either with a view to determine those matters which fell under his own jurisdiction, or in order to transmit an account of it to some other criminal court, he proceeded, in the same manner that was customary in the courts of the hundred, and of the county, by the assistance of an *inquest* or jury; and the number of jurymen, who, in those cases, were called from the neighbouring townships, was not less than was employed in other judicial investigations.

After the Norman conquest, when the *aula regis* drew to itself the cognizance of the greater part of crimes, it became the duty of the coroner to certify to that court his inquisition concerning those offences which fell under its jurisdiction; and upon this information, the most authentic that could well be procured, a trial before the grand justiciary was com-

menced. Upon the establishment of the king's bench, and of the commissions of oyer and terminer and gaol delivery, the like certification, and for the same purpose, was made by the coroner to those tribunals.

But in proportion to the advancement of the prerogative, the authority of the coroner, an officer elected by the county, was diminished; his jurisdiction was daily subjected to greater limitations; and his reports became gradually more narrow and defective: whether it be that, by having a fellow-feeling with the inhabitants, he endeavoured to screen them from justice, or that, from the rust and relaxation to which every old institution is liable, his operations became tardy and inaccurate; certain it is, that he came to overlook the greater part of the offences which require the interposition of the magistrate, and his inquisition was at length confined to a few of those enormous crimes, which excite universal indignation and resentment.

To supply the deficiency of the coroner's inquest, the sheriff, who had come, in a great measure, under the appointment of the crown, was directed, upon the meeting of judges in

the circuits, or of the other criminal courts, to call a jury, in order to procure information concerning the crimes committed in particular districts. Hence the origin of what is called the *grand jury*, by whose inquisition the judges were authorized to proceed in the trial of public offenders.

It is probable, that when the grand jury were first called, they made an inquiry at large concerning every fact which ought to become the subject of a criminal trial, and of their own proper motion delated the persons whom they found to deserve an accusation; but, by degrees, when the agent for the crown had been led to suspect any particular person, he was accustomed to lay before them the immediate question, how far that suspicion was well founded? Hence the two methods of finding the fact; by *presentment*, and by *indictment*.

It seems evident, from what has been observed, that the original purpose of the inquisition by the coroner, and of a *presentment* by the grand jury, was to prevent offenders from being overlooked, and from escaping a trial. When the custom of preferring *indictments* to the grand jury was introduced, the intention

of that measure was, probably, to avoid the trouble and expence of a fruitless prosecution. But whatever was originally intended by this practice, the necessity of procuring the previous approbation of a jury, by one or other of the forms above mentioned, was productive of the highest advantage to the people, that of securing them from groundless or frivolous accusations. If a person is known to have committed a crime, or lies under a strong suspicion of guilt, the voice of the whole neighbourhood will probably call aloud for justice, and demand an immediate trial of the offender. But if, on the contrary, an innocent man is attacked, if he is threatened with a prosecution, from apparently malicious motives, or for the purpose of serving a political job, it is most likely that his fellow citizens will view this proceeding with indignation; that they will consider his misfortune as, in some measure, their own; and that, from a principle of humanity and justice, as well as from a regard to their own interest, they will be excited to stand forth as the protectors of innocence.

This is a new instance, perhaps more conspicuous than any that we have had occasion

to observe in the history of the English government, of a regulation whose consequences were not foreseen at the time when it was introduced. The great benefit arising to society from the interposition of the grand jury is not only totally different, but even diametrically opposite to that which was originally intended by it. The original purpose of that institution was to assist the crown in the discovery of crimes, and by that means to increase the number of prosecutions. But when an accurate police had been established in the country, there was little danger that any crime of importance would be concealed from the public; and it became the chief end of the grand jury to guard against the abuses of the discretionary power with which the officers of the crown are invested, that of prosecuting public offences.

The employment of the coroner in Scotland was the same as in England; and he appears to have used the same forms in the exercise of his jurisdiction. With the assistance of a jury, he inquired into the commission of crimes, and either punished them by his own authority, or transmitted information concerning them

to the competent court. The negligence of this officer seems, in that country, to have likewise produced the interposition of the sheriff, or chief magistrate of particular districts, by calling a jury for the same purpose. By a statute in the reign of Alexander the second, it is enacted, that no prosecution, at the instance of the crown, shall proceed against any person, unless by an accusation, upon the inquisition of a jury, consisting of the chief magistrate of the place, and three respectable persons in the neighbourhood. This rule continued till near the end of the sixteenth century; when, in consequence of the establishment, of the court of session, and from other causes, the investigation of judicial matters, by a jury, came to be much more limited than it had formerly been. By an act of the Scottish parliament, in 1587, certain commissioners, instead of the inquest formerly called, were appointed in the several counties, for inquiring into public offences; and indictments, framed upon the report of these commissioners, were put into a list, which got the name of the *porteous roll**.

* See act of Parliament, 1587. ch. 82.

The same statute empowered the king's advocate to prosecute crimes of his own proper motion*; and, as he was the person employed to raise indictments, upon the information transmitted by the commissioners, he naturally assumed the privilege of determining whether the facts laid before him ought to be the ground of a prosecution or not. Thus in Scotland the ancient grand jury was abolished; and criminal actions, at the instance of the public, came, in all cases, to be directed at the discretion of a crown officer.

The attorney-general in England, and the master of the crown-office, have acquired, in like manner, a power of prosecuting by *information*, without any previous authority of a grand jury; but this mode of prosecution is confined to misdemeanours tending to disturb the government, or the peace and good order of society, and is never extended to crimes of a capital nature.

How far the nations upon the continent were possessed of a similar provision, to secure the people from unjust and groundless prosecutions, it is not easy to determine. That in

* Ch. 77.

the greater part of them the coroner's inquest was employed for bringing to light those disorders which required the interposition of a criminal court, there is no room to doubt. But when, from the circumstances which have already been pointed out, the method of trial by the petty jury had fallen into disuse, it is not likely that a previous inquest would still be employed to judge of the necessity or expediency of commencing a criminal accusation. From the rapid advancement of the prerogative in these nations, the sovereign was freed from any restraint in this branch of administration, and an unbounded liberty of trying public offences was committed to the officers of the crown. To whatever causes it may be ascribed, the English grand jury is now the only institution of the kind that remains in Europe; and perhaps, as it is modelled at present, there cannot be found, in the annals of the world, a regulation so well calculated for preventing abuses in that part of the executive power which relates to the prosecution of crimes.

SECTION III.

Circumstances which prevented the civil law from being so much incorporated in the system of English jurisprudence, as in that of other European countries.

To those who survey the common law of England, in its progress towards maturity, there is one peculiarity which must appear extremely remarkable; the little assistance it has borrowed from the ancient Roman jurisprudence; that system of equity, which has been so highly esteemed, and which, in the other countries of Europe, has excited such universal imitation. Why the English have deviated, in this particular, from the practice of all the neighbouring nations, and have disdained to draw supplies from those plentiful sources of legal knowledge, by which many systems of modern law have been so amply enriched, it seems a matter of curiosity to inquire: at the same time that, by examining the causes of a proceeding so singular, and apparently so unreasonable, we shall, perhaps, be enabled to

discover the advantages or disadvantages which have resulted from it; and likewise to form an opinion, how far expediency may, in the present state of things, recommend the same, or a different line of conduct.

The Gothic nations who subdued the provinces of the Roman empire, and settled in the countries which they had over-run, were by degrees incorporated with the ancient inhabitants; and from the communication and mixture of these two races of men, there was formed a composition of laws, manners, and customs, as well as of language; in which, upon different occasions, and from a variety of circumstances, the proportions contributed by the one people, or by the other, were accidentally more prevalent. Although the ancient inhabitants were, every where, the vanquished party, they possessed that superiority which knowledge and civilization have usually bestowed over ignorance and barbarism; and hence we find a multitude of Roman institutions inserted in the codes of law, which, at an early period, were published by many kings or leaders of those barbarous nations.

Soon after the settlement of those barbarians,

or rather before it was completed, they embraced Christianity, and fell under the direction of the Christian clergy; who, having been firmly established in the Roman empire, were enabled to preserve their footing in those new states that were formed. These ecclesiastics were attached to the Roman law, in opposition to the barbarous customs of the new settlers; both as it was the system with which they were acquainted, and as it was calculated to maintain that peace and tranquillity, which their profession and manner of life disposed them to promote.

The doctrines of Christianity, unlike the fables which constituted the mythology of the Greeks and Romans, contained philosophical truths, which the teachers of that religion were under the necessity of knowing, and by the knowledge and propagation of which they supported their credit among the people. Those teachers, therefore, became conversant in several branches of literature; and, as their theological system afforded them great scope for speculation and reasoning, and consequently for difference of opinion, they soon arranged themselves in different sects; disputed eagerly

with one another; and, in proportion to their zeal in making proselytes, acquired a degree of acuteness and skill in defending their several tenets.

The learning and abilities which came, in this manner, to be possessed by the clergy, together with the general ignorance and superstition of the people, bestowed upon the former an influence and authority over the latter, and produced, as I formerly took notice, an extensive jurisdiction both in ecclesiastical and secular matters. It is sufficient here to observe, that in the exercise of this jurisdiction, ecclesiastical judges were guided, as far as the difference of circumstances would permit, by the rules and principles of the Roman jurisprudence; which had been transmitted from the ancient inhabitants of the provinces, and were delivered in the collections made by different Roman emperors, by Theodosius the younger, by Justinian, and by many of his successors. The Roman system became, in a great measure, the law of the church; and was therefore propagated by her, with the same zeal, and from the same views and motives, by which she was actuated in supporting and extending her influence and authority. The disorders which,

for some centuries, were continued, by the successive invasions of new barbarous tribes, retarded, no doubt, the progress of every regular establishment. But when Europe began to recover from these convulsions, and when the restoration of public tranquillity was followed, as there was reason to expect, by the revival of letters, the efforts of the clergy, to extend the credit and authority of the Roman law, became highly conspicuous and successful. Innumerable schools were founded in cathedrals and monasteries, many of which, under the patronage of the church, obtaining large endowments, and being invested with jurisdiction and various privileges, became what are now called universities. Both the *canon law*, which was the rule of decision in ecclesiastical courts, and the *civil law*, properly so called, the original fund from which a great part of the former had been gathered, were taught in these different seminaries, and thus rendered familiar, not only to those who had views of entering into holy orders, but to all who received the benefit of a liberal education.

About the end of the eleventh century, Ivo de Chartres published a collection of canon-

law, much more complete than any that had been formerly made; though it was much inferior to the subsequent compilation of Gratian, a Benedictine monk, known by the title of the *Decretum*.

In the year 1137, the Pisans, at the taking of the town of Amalphi, found a copy of Justinian's Pandects; and to this accident, the rapid cultivation of the civil law, from that period, has been commonly ascribed. But we may be allowed to entertain some doubt, whether an event of that magnitude could have proceeded from a circumstance apparently so frivolous.

There is no reason to believe that this book had been entirely lost in the western part of Europe, although, for a long time, it had been less in request than other compilations upon the same subject. Ivo de Chartres, in the preceding century, quotes the laws of the Pandects; and Irnerius, professor of law at Bologna, as early as the year 1128, prelected upon some part at least of Justinian's compositions.

Even supposing the Pandects to have been lost, there were many other writings upon the Roman law still remaining, from which the

knowledge of it might, in some degree, have been preserved; the Institutes, the Codex; and the Novellæ of Justinian; the Theodosian Code; and the compilations, published after the time of Justinian, by different emperors of Constantinople.

Neither is it likely that, if men had possessed no previous disposition to that study, it would have been inspired by finding an old book upon the subject. Few people will be at the pains to peruse a long book, upon any abstract science, unless they already feel a strong inclination to acquire the knowledge contained in it. But, in the twelfth century, when, from different circumstances, a spirit of improvement began to diffuse itself in Italy and France, it is probable that men of learning were excited to the discovery of ancient books upon every subject; and, as the civil law became then a principal object of attention, the Pandects, containing the fullest collection of legal opinions and decisions, was considered as the most instructive work of the kind, and copies of it were greedily sought for. As Amalphi was, at this time, the chief trading state of Italy, an Amalphitan merchant, ob-

serving the demand for books of that nature, is said to have brought from Constantinople this copy of the Pandects, which was found by the Pisans. Some authors mention another copy of the same book, that had been discovered in the year 1128, at Ravenna*.

However this be, the Roman law was, upon the revival of letters in Europe, universally held up and admired as the great system, from an imitation of which the laws of each particular country might receive the highest improvement. This the modern lawyers were, by their education, accustomed to consider as the standard of reason and equity; and, wherever their own municipal customs were defective, they had recourse to it, in order to supply what was wanting, or to correct what was amiss. Even such of the modern writers as endeavoured to delineate the principles of natural justice, independent of all positive institutions, made use of the Roman system, almost exclusively of every other, in order to illustrate their doctrines.

Although the Roman law was, in this man-

* Giannone, History of Naples.

ner; generally incorporated in that of the modern European nations, it acquired more authority in some of these nations than in others. The German emperors appear to have considered themselves as the successors to the Roman empire in the west, and their dominions as therefore subject to that system of law, by which the Romans were governed. Hence, in Germany, properly so called, in the Southern part of France, or what are called the *pays de droit ecrit*, and in several parts of Italy, which, at the time when the German emperors enjoyed the highest prosperity, were included under their dominion, the Roman law is understood to be the common law of the country, to which the inhabitants, upon the failure of their own municipal customs and regulations, are bound to submit. In other European countries it is viewed in the light of a foreign system; which, however, from its intrinsic merit, is entitled to great attention and regard; and of which many particulars have been, in a manner, naturalized by long usage, or adopted by the positive will of the legislature. This is the case in Spain, in Portugal, in the northern parts, or what are called the

Pays de coutumes, in France, in Sweden, in Denmark, and in Scotland*.

Upon the revival of letters, the same regard to the Roman law was discovered in England as in the other countries of Europe. It was propagated with equal zeal by the clergy, and, in the twelfth century, became the subject of public lectures in both the universities. The decisions and principles delivered in the writings of Justinian, were borrowed, and even the expression was frequently copied, by Bracton, by the author of Fleta, and by other English lawyers of that period. The work attributed to Glanville, the grand justiciary of Henry the second, and a Scotch law book, known by the name of *Regiam Magistatem*, both set out with a passage which is almost literally the same; whence, as well as for other reasons, it is concluded, that the latter of these productions has been copied from the former. Upon examination, however, the passage in question is

* Duck de Auctoritate Jur. Civil.—It should seem, that, since the time when this author wrote, the ideas of the inhabitants, in some of those countries, have undergone a considerable change upon that subject.

found in the preface to the Institutes of Justinian.

The settlement of the chief courts of common law in the neighbourhood of the capital, which was begun in consequence of the great charter of king John, and completed in the reign of Edward the first, made it necessary that the lawyers, and other practitioners in those courts, should reside there also. Hence arose the *inns of court*, and *of chancery*, which were lodging-places in the neighbourhood of London, intended for the accommodation of the retainers about the courts of Westminster. Seminaries of common law were soon formed in those places of resort; and lectures upon that subject were given to the elder students, in the inns of court; and to the younger students, in the inns of chancery. The king gave encouragement to these institutions, by forming the members of each lodging-place into a sort of corporation, and by establishing a set of rules for their conduct. We find that Henry the third bestowed upon them an exclusive privilege, by prohibiting any other school for teaching law within the city of London.

The universities of Oxford and of Cambridge were the only other institutions in the kingdom, in which law was taught with public encouragement. But in those learned societies, the only systems which had reputation, and which were thought worthy of public lectures, were those of the civil and the canon law. The municipal law, from its tendency, in many particulars, to encourage violence and disorder, from the barbarous jargon in which it was involved, and from the want of literature among its practitioners, was treated with contempt. These practitioners, we may easily imagine, were disposed to retaliate those unfavourable sentiments. Upon this account, and from the distance between the seats of instruction, in civil and municipal law, the former contributed no assistance to the latter. Those two branches of education were carried on apart, and became entirely distinct, and separate. The teachers of each, instead of co-operating in order to form a complete lawyer, were actuated by mutual jealousy and opposition; and the one science being treated as despicable in the universities, the other was probably represented as useless by the practitioners of the common law.

For some time the civil law, under the patronage of the clergy, and of the universities, was in the highest esteem throughout the nation; and the study of the municipal law was confined to mere lawyers by profession; but at length, from the natural course of things, the comparative value of those two branches of science was of necessity altered. The latter, being that system by which the property and the conduct of individuals were chiefly regulated, could not fail to rise in consideration and importance; at the same time that, by the progress of judges in experience and refinement, its defects were gradually supplied; while the laws of Rome, which were unconnected with the ordinary courts of justice, and therefore of no practical utility, became an object of little attention.

We accordingly find, that, in the reign of Edward the fourth, and even before that time, the inns of court and chancery had become the fashionable places of education for men of rank and fortune, and were frequented by a great multitude of students. There were four inns of court, and no less than ten of chancery; in each of the former, the number of students

amounted to about two hundred, in each of the latter, to about an hundred. Neither was the system of education, in this great seminary, confined entirely to law: it comprehended all exercises, and every sort of accomplishment becoming a gentleman of the king's court; such as dancing and music. Sir John Fortescue informs us, that it was likewise customary to study divinity *on festival days*; I suppose, by way of relaxation*.

Justice Shallow is introduced by Shakespear, boasting, that he had been a student of *Clement's Inn*, and that he had often heard the chimes at midnight; as a proof that he was a young man of fashion and spirit,—In the same manner as he boasted of his acquaintance with John of Gaunt.

When those teachers of the common law had begun to feel their own consequence, they assumed the privilege of bestowing rank upon their students of a certain standing; and conferred the degrees of *serjeant*, and *apprentice*, corresponding to those of *doctor* and *bachelour* in the universities.

* Fortescue de laudibus Leg. Ang.—Also the discourses on this subject preserved in Hearne's collection of antiquities.

As the separation of the civil and the municipal law produced an aversion to the former in the inns of court and chancery, we may easily conceive, that the same prejudice would be communicated to their numerous pupils, and thus become prevalent among the nobility and gentry of the kingdom. Hence the jealousy discovered, on several occasions, by the English parliament, lest, by the influence of the clergy, the laws of ancient Rome should be introduced into England; of which a remarkable instance is mentioned in the reign of Richard the second; when the nobility, in parliament, declare, "that the realm of England "hath never been unto this hour, neither by "the consent of our lord the king, and the "lords of parliament, shall it ever be ruled or "governed by the civil law*." As the laws of ancient Rome had not been incorporated in the municipal system, they seem to have been viewed, by the partisans of the latter, in the same light with the doctrines of a rival sect, which has with difficulty been prevented from acquiring the superiority in the national establishment.

Blackstone's Commentaries.

It has been alleged by authors of note, that the opposition of the English nobility to the civil law, arose from its being the law of a despotic government, and therefore inconsistent with their notions of English liberty. But whoever has examined the compilations of Justinian with any attention, must be sensible that there is no foundation for this remark. Those collections relate almost entirely to the private, and touch very slightly upon the public law of the empire. But with respect to property, and the rights of private persons, the opinions and decisions of the Roman lawyers do not seem to have been at all perverted by the nature of their government. Perhaps it will be difficult to point out any modern system of law, in which the rules of justice among individuals appear to be so little warped by the interest of the crown, and in which the natural rights of mankind are investigated and enforced with greater impartiality. In one or two cases, you meet with an observation, "that the prince is above the laws." These, however, are detached, and, as it were, insulated expressions, delivered in general terms, and without any visible effect upon the body

of the work; which relates, not to disputes between the emperor and his subjects, but to such as may arise among the people.

After the free government of Rome was overturned, the emperors found it expedient for a long time to conceal the extent of their usurpation, and to leave the ordinary judges in a great measure, undisturbed in the exercise of that jurisdiction which had been founded in the more fortunate times of the republic. Augustus first set the example of this prudent dissimulation, which was copied by a great number of his successors. Beside the apprehension that the old republican spirit was not entirely extinguished, and the circumstance that the throne continued elective, the emperors were kept in awe by those powerful armies, under particular officers of distinction, which were maintained in the provinces. These were much superior to that pretorian guard, which, for the immediate support of the imperial dignity, was established in the neighbourhood of Rome. In this manner a sort of balance, however precarious, was for some time held, by the military forces dispersed over the empire, and by the jealousy between the emperor and the

leader of each considerable army; in consequence of which, the former was deterred from invading and destroying the internal structure of the constitution.

Some of the first emperors, indeed, were guilty of enormous crimes and disorders; but the effect of these appears to have been limited, in a great measure, to persons high in office, or in such rank or station as to be involved in the intrigues of the court. In the succeeding period the Romans were more fortunate, and the throne was filled by a series of princes who are an honour to human nature; Nerva, Trajan, Adrian, Antoninus Pius, and Marcus Aurelius. Under these emperors no interference of the crown prevented the equal distribution of justice; the experience of an empire, which included the whole civilized world, was accumulated in one mass; and the system of private law was thus brought to much greater perfection than it had attained in the preceding ages.

In the reign of Adrian was composed the *perpetual edict*, the first great compilation of the rules of decision; and this became the ground-work of most of the writings published

by succeeding lawyers. It was about this time that the law began to be regularly cultivated as a science; that it became the object of a lucrative profession; and that it was taught at Rome with public encouragement*.

Severus new modelled the pretorian guard, by appointing that it should consist of above fifty thousand men; about four times the ancient number; and that it should be recruited, not, as formerly, from the effeminate inhabitants of Italy, but from the hardy and well-disciplined legions upon the frontiers. With the command of this army the emperor possessed a force which nothing in the whole empire was able to oppose; and the government of course degenerated into an absolute military despotism. From this time, therefore, the law could not fail to decline. From the influence of long usage, however, it appears to have declined very slowly; and, notwithstanding the

* The practice of lawyers taking an *honorarium*, had been introduced before the end of the commonwealth, but was prohibited by statute. Complaints of the violation of this law were made in the reign of Claudius; when it was enacted, that no lawyer should receive, in one cause, more than 100 *aurei*, or about 80*l.* sterling.

ignorance and barbarism in which the people were sunk, together with the heavy yoke of tyranny to which they were subjected, the ancient system was treated with respect.

It merits attention, that the opinions and decisions contained in the *Pandects* of Justinian, were delivered by authors, who either lived entirely, or at least received their education, before this great revolution was introduced; and probably a considerable time before its effects, in subverting the private law of the country, had been very sensibly felt. Modestinus, the latest of those authors, wrote in the reign, I think, of the younger Gordian, and only about thirty years below that of Severus.

The *Institutes*, an elementary book upon the science of law, intended as an introduction to the perusal of the *Pandects*, was likewise composed, with a very few additions of Justinian, by an old lawyer, who lived within the period above mentioned.

As the proscription of civil law from the courts of Westminster-hall proceeded entirely from the animosity and opposition between the universities, and the inns of court and chancery; it may be supposed that this would con-

tinue no longer than while the latter preserved their consideration and popularity. For a long time, however, these institutions have not only ceased to be the great seminaries for educating the nobility and gentry; but have become of little use for conveying instruction to practical lawyers. No lectures are now given in the inns of court or chancery; no exercises are performed; no measures are taken for directing the application of those who, of their own accord, may be disposed to study. The whole care of education seems to be devolved upon the cook; and the only remaining part of the ancient regulations is, that the student shall eat his commons for a certain number of terms.

The causes of this alteration it is not difficult to discover. Beside the luxury of a great metropolis, which is calculated to produce idleness and dissipation both in teachers and scholars, the profits arising from the practice of the law, together with the prospect of preferment in the state, have allured men of spirit and abilities to desert the more speculative and less distinguished employment of communicating the principles of the science to a set of pupils.

To counteract this natural tendency, and to maintain the vigour of teaching law, notwithstanding the superior advantages derived from the practical profession of a lawyer, public encouragement, as well as the strictest regulation, would have been requisite; but this object appears to have been overlooked by government; and, upon the advancement of national wealth and prosperity, the old institutions were left to their natural course.

But the decay of the inns of court and chancery did not immediately change the ideas which, in their more flourishing condition, they had impressed upon the nation. The movement continued, and its direction was little varied, for a long time after the hand that gave it was withdrawn. It is but of late years that the prejudices, which had so long prevailed, have begun to disappear, and that the same liberal spirit with which the nation is animated in the prosecution of other sciences, has been extended to the interpretation of the rules of justice. In ecclesiastical courts, indeed, and in those of the universities, the civil law has been long followed; but this proceeded in some measure from prepossession;

as the rejection of that system, in the courts of Westminster-hall, was the effect of prejudice. Upon the rise of the court of chancery, its decisions were commonly directed by a clergyman; who naturally possessed an attachment to that system of equity, the propagation of which was the great aim of the whole ecclesiastical order. In the court of the admiral, which acquired a jurisdiction in maritime causes, the principles adopted were such as had been suggested, not by the peculiar customs of England, but by the common intercourse of commercial nations, and in which a great proportion of the civil law was introduced. A similar system was embraced in the courts of the constable and marshal; who, from having the command of armies, more especially when engaged in foreign expeditions, were permitted to assume a military jurisdiction. These officers, as might be expected, were led to imitate the general practice of Europe, or what may be called the law of nations.

It was reserved for the enlightened judges of the present age to estimate the system of Roman jurisprudence, according to its intrinsic merit; and without being influenced by ad-

ventitious circumstances, to derive from it, in the courts of common law, such assistance as it was capable of bestowing. Of all the sciences, law seems to be that which depends the most upon experience, and in which mere speculative reasoning is of the least consequence. As the Roman system contains the accumulated experience and observation of ages, and of the most extensive empire that ever existed in a civilized form; the advantages resulting from it, as an example to the lawyers and judges of any modern country, must be proportionably great. It presents the largest collection of equitable decisions, and rules, that is any where to be found. These are calculated to enlarge the compass of legal knowledge, without having the influence to mislead; they have all the benefit of precedents, without any authority to impose; and, therefore, may render the system of English law more full and comprehensive, without any danger of corrupting it.

SECTION IV.

The Rise of the Court of Chancery.

In attempting a general outline of the principal English courts, the judicial authority of the chancellor now remains to be considered. The jurisdiction of this officer was plainly derived from the nature of his employment in the king's household, and from the ministerial powers over the kingdom, with which he thence came to be invested. By being the king's secretary and chaplain, he enjoyed the peculiar confidence of his master; and had the sole charge of writing his letters; and afterwards of issuing *writs* in the name of the crown. As it became customary that every vassal should hold his fief by a charter from the superior, the power of granting those deeds, throughout the royal demesne, became the source of great influence, and, after the Norman conquest, when the nobility were all reduced into the state of crown-vassals, raised the chancellor to be a principal officer of state.

When the deeds issuing from the crown became numerous, the care of expediting many of them was devolved upon inferior persons; and, to ascertain their authenticity, the subscription of the chancellor, and afterwards a public seal, of which he obtained the custody, was adhibited*.

At what time signatures became customary, in England, to deeds proceeding from the crown, appears uncertain. It is probable that they were known to the Anglo-Saxons; but that they did not become frequent until the settlement of the Norman princes. From this period the chancellor was considered as having a title to the keeping of the great seal; but as, from the caprice of the monarch, there occurred some instances in which it was en-

* The subscription of the *referendarius*, who was probably the chancellor, occurs as far back, in the Anglo-Saxon period, as the reign of Ethelbert, the first Christian king. In the reign of Edward the Confessor we meet with a charter subscribed by the chancellor, under that express appellation: "Ego Rembaldus cancellarius subscripsi." Selden on the office of lord chancellor in England.

In France, and probably in all the kingdoms in the western part of Europe, the chancellor came to be the ordinary keeper of the king's seal.

trusted to a different person, a statute was made in the reign of Henry the third, requiring that the employments of lord-keeper and chancellor should always be conjoined; a regulation which, having sometimes been overlooked, was afterwards renewed in the reign of Elizabeth*.

In this manner all important writings, issued by the king, either came through the medium of the chancellor, or were subjected to his inspection. Before he affixed the great seal to any deed, he was bound to examine its nature, and, if it proceeded upon a false representation, or contained any thing erroneous or illegal, to repeal and cancel it. So early were laid the foundations of a maxim, which in after days has been gradually extended; that the servants of the crown are justly responsible for measures which cannot be executed without their concurrence. As the exercise of these powers required a previous examination and cognizance, it gave rise to an ordinary jurisdiction, which, although of great importance, has occasioned no controversy, and appears to have excited little attention.

* Selden on the office of chancellor, 5 Eliz. c. 18.

The extraordinary jurisdiction of the chancellor arose more indirectly, from his character and situation. The origin of his interposition, to correct the decisions of the ordinary tribunals, was formerly suggested. When the king's baron-court, confining itself within the rules of common law, had been laid under the necessity of giving a decision, which, in its application to particular cases, was found hard and oppressive, the party aggrieved was accustomed to petition the king for relief. Applications of this nature were brought before the privy-council; and the consideration of them was naturally referred to the chancellor; who, as the secretary of the king, being employed to register the decrees, and to keep the records of his baron-court, was rendered peculiarly conversant and intelligent in all judicial discussions.

A jurisdiction of this nature appears to have been acquired by the same officer, in several, if not in the greater part, of the kingdoms of Europe. Such, in particular, was that of the chancellor in France; who, under the kings of the first and second race, had the custody

of their seal, and was distinguished by the appellation of the *grand referendaire*.*

In England, it should seem that, before the end of the Saxon government, the chancellor was employed in giving redress against the hard sentences pronounced by the judges of the king's demesne. As those judges, however, had then a very limited authority, his interpositions were proportionably of little importance. But, after the accession of William the Conqueror, when the *aula regis* became the king's ordinary baron-court, and drew to itself almost the whole judicial business of the nation, the exercise of such extraordinary jurisdiction began to appear in a more conspicuous light. From this period, the multiplication of law-suits before the grand justiciary, produced more various instances of imperfection in the rules of common law; and, from greater experience and refinement, the necessity of relaxing in the observance of these rules, by the admission of numerous exceptions, was more sensibly felt.

* See Pasquier's Recherches de la France, and the authorities to which he refers.

As applications for this purpose became frequent, provision was made in order to facilitate their progress; and the tribunal to which they were directed grew up into a regular form. A committee of the privy council had, in each case, been originally appointed along with the chancellor to determine the points in question. But, as these counsellors paid little or no attention to business of this nature; of which they had seldom any knowledge; their number, which had been arbitrary, was therefore gradually diminished; and at last their appointment having come to be regarded as a mere ceremony, was entirely discontinued. Subordinate officers were, on the other hand, found requisite in various departments, to assist the chancellor in preparing his decisions, and in discharging the other branches of his duty.

The authority, however, which was thus exercised by this great magistrate, in order to correct and to supply the most remarkable errors and defects in the ancient rules of law, appears to have still proceeded upon references from the king or from the privy council. His interpositions depended upon the decisions given by other courts, and were of too singu-

lar a nature to be easily reduced into a system, or to be viewed in the light of a common remedy. It was at a later period, that the chancery became an *original* court, for determining causes beyond the reach of the ordinary tribunals. This institution, arising from circumstances more accidental than those which produced the jurisdiction above-mentioned, does not seem to have pervaded the other European countries, but is in a great measure peculiar to England.

According to the feudal policy in the western part of Europe, all jurisdiction was inseparably connected with landed property; and actions of every sort proceeded upon a mandate, or commission, from that particular superior within whose territory the cause was to be tried. If an action was intended before a court deriving its jurisdiction from the king, the plaintiff made application to the crown, stating the injustice of which he complained; in answer to which, the sovereign ordered the adverse party to appear before a particular court, in order that the cause might be heard and determined. The *writ* or *brief*, issued for this purpose by the king, served not only to

summon the defendant into court, but also, in that particular question, to authorize the investigation of the magistrate. The different barons, in their respective demesnes, issued briefs in like manner, for bringing any law-suit under the cognizance of their several courts.

In England this mode of litigation was uniformly observed, in proceedings before the *aula regis;* and was afterwards adopted in the three courts of common law, among which the powers of the grand justiciary were divided.

The primitive writs, upon which any action was commenced, being accommodated to the few simple claims that were anciently enforced in a court of justice, were probably conceived in such terms as might occur without much reflection. But complaints upon the same principle of law being frequently repeated, the same terms naturally continued; so that, by long usage, a particular form of writ was rendered invariable and permanent in every species of action. This preservation of uniformity, although perhaps the effect of that propensity, so observable in all mankind, to be governed

on every occasion by analogy, proved, at the same time, of great advantage, by ascertaining and limiting the authority of the judge. From the advancement of property, however, and from the multiplied connections of society, there arose new claims, which had never been the subject of discussion. These required a new form of writ; the invention of which, in consistency with the established rules of law, and so calculated as to maintain good order and regularity in the system of judicial procedure, became daily a matter of greater nicety and importance.

Application, in such cases, was made to the chancellor; who, from a scrupulous regard to precedents, was frequently unwilling to interpose, but referred the parties to the next meeting of parliament. These references, however, as might be expected, soon became burdensome to that assembly; and, by a statute in the reign of Edward the first, it was provided, that, "Whensoever, from thenceforth, "it shall fortune in chancery that, in one case "a writ is found, and in like case, falling un- "der like law, and requiring like remedy, is "found none, the clerks in chancery shall

" agree in making the writ, or shall adjourn " the plaintiffs to the next parliament, where " a writ shall be framed, by consent of the " learned in the law; lest it might happen " for the future, that the court of our lord " the king should long fail in doing justice to " the suitors*."

The new writs, devised in consequence of this law, were, for some time, directed to such of the ordinary courts as, from the nature of the case, appeared to have the most proper jurisdiction. At length, however, there occurred certain claims, in which, though seeming to require the interposition of a judge, it was thought the courts of common law would not interfere. In these, the chancellor, willing to grant a remedy, and, perhaps, not averse to the extension of his own authority, adventured to call the parties before himself, and to determine their difference †. This innovation is said to have been introduced about the time of Richard the second, and for the purpose of supporting a contrivance to elude the statute

* Statutes at Large, 13 Edward I. c. 24.

† This was done by the writ of *subpœna*.

of *mortmain*, by the appointment of trustees to hold a landed estate, for the benefit of those religious corporations to which it could not be directly bequeathed. The courts of common law could give no countenance to a stratagem so palpably intended to disappoint the will of the legislature. But the chancellor, as a clergyman, was led, by a fellow-feeling with his own order, to support this evasion; and, pretending to consider it as a matter of conscience, that the trustees should be bound to a faithful discharge of their trust, took upon him to enforce the will of a testator, in opposition to the law of the land.

Having successfully assumed the cognizance of one case, in which he was particularly interested, the chancellor found little difficulty in extending his jurisdiction to others. In these, he appears to have acted more from a general regard to justice; and, in consequence of the limited views entertained by the ordinary courts, his interposition seemed immediately necessary. His authority thus grew up imperceptibly: what was begun in usurpation, by acquiring the sanction of long usage, became a legal establishment; and, when it afterwards

excited the jealousy of the courts of common law, its abolition was regarded as impolitic and dangerous. After the direction of chancery had long been possessed by clergymen, who, from their situation, were intent upon the increase of its jurisdiction, it was, upon some occasions, committed to lawyers by profession; by whom its procedure was more digested into a regular system.

From what has been observed, concerning the extraordinary jurisdiction of the court of chancery, there can be no doubt that it was originally distinguished from that of the other courts of Westminster-hall, by the same limits which mark the distinction between *common*, or *strict law*, and *equity*. Its primitive interpositions were intended to decide according to conscience, upon those occasions when the decisions of other courts, from an adherence to ancient rules, were found hard and oppressive. It was afterwards led to interpose in original actions, in order to make effectual those new claims which the ordinary courts accounted beyond the limits of their jurisdiction. The first branch of this authority in the court of chancery was therefore designed to correct the

injustice, the other to supply the *defects*, of the other tribunals.

This accordingly seems to have been the universally received idea of that court; which is called a *court of equity*, by every author who has occasion to mention it. In this view it is considered by Lord Bacon, who himself held the office of chancellor, and who, among all his cotemporaries, appears to have been the best qualified to understand its nature. The same opinion of this court was entertained by the learned Selden. "Equity," says that author, "is a roguish thing; for law we have a "measure; know what to trust to. Equity "is according to the conscience of him that "is chancellor; and, as that is larger or nar-"rower, so is equity. 'Tis all one as if they "should make the standard for measure a "chancellor's foot. What an uncertain mea-"sure would this be! One chancellor has a "long foot; another a short foot; a third, an "indifferent foot. 'Tis the same thing in the "chancellor's conscience*."

The ingenious and acute author of "The "Principles of Equity" has adopted this no-

* Selden's Table-talk.

tion, concerning the nature of the court of chancery; and disputes with Lord Bacon, whether it is more expedient, that the equitable jurisdiction, and the jurisdiction according to strict law, should be united in the same court, as in ancient Rome; or divided between different courts, as in England?

In opposition to these authorities, Justice Blackstone, a writer whom, in a practical point of this nature, we can hardly suppose to be mistaken, affirms* that there is no such distinction between the chancery and the other courts of Westminster; and maintains that the latter are possessed of an equitable jurisdiction; while the former, to which, however, like other writers, he gives the appellation of a *court of equity*, is accustomed to decide according to the rules of strict law.

To reconcile these different opinions, it seems necessary to suppose that they refer to different periods; and that both the chancery, and the other courts in question, have, since their first establishment, been subjected to great alterations. This is what, from the nature of things, might reasonably be expected. Lord Bacon

* See his Commentaries, Book III. chap. 4 and 7.

and Mr. Selden speak of the court of chancery as it stood in a remote period: and, in a matter relating to the history, or even the philosophy of law, Justice Blackstone might easily be deceived.

The distinction between strict law and equity is never, in any country, a permanent distinction. It varies according to the state of property, the improvement of arts, the experience of judges, the refinement of a people.

In a rude age the observation of mankind is directed to particular objects; and seldom leads to the formation of general conclusions. The first decisions of judges, agreeable to the state of their knowledge, were such as arose, in each case, from immediate feelings; that is, from considerations of equity. These judges, however, in the course of their employment, had afterwards occasion to meet with many similar cases; upon which, from the same impressions of justice, as well as in order to avoid the appearance of partiality, they were led to pronounce a similar decision. A number of precedents were thus introduced, and, from the force of custom, acquired respect and authority. Different cases were decided, from the view

of certain great and leading circumstances in which they resembled each other; and the various decisions, pronounced by the courts of law, were gradually reduced into order, and distributed into certain classes, according to the several grounds and principles upon which they proceeded. The utility of establishing general rules for the determination of every law became also an object of attention. By limiting and circumscribing the power of a judge, they contributed to prevent his partiality in particular situations; and by marking out the precise line of conduct required from every individual, they bestowed upon the people at large, the security and satisfaction arising from the knowledge of their several duties and rights.

But although the simplification of decisions, by reducing them to general principles, was attended with manifest advantage, it was, in some cases, productive of inconvenience and hardship. It is difficult, upon any subject, to establish a rule which is not liable to exceptions. But the primitive rules of law, introduced by unexperienced and ignorant judges, were even far from attaining that perfection

which was practicable. They were frequently too narrow; and frequently too broad. They gave rise to decisions, which, in many instances fell extremely short of the mark; and which, in many others, went far beyond it. In cases of this nature, it became a question; whether it was more expedient, by a scrupulous observance of rules, to avoid the possibility of arbitrary practice, or by a particular deviation from them, to prevent an unjust determination? In order to prevent gross injustice under the sanction of legal authority; an evil of the most alarming nature; it was thought advisable, upon extraordinary occasions, to depart from established maxims, and, from a complex view of every circumstance, to decide according to the feelings of justice. The distinction between *strict law* and *equity* was thus introduced; the former comprehending the established rules; the latter, the exceptions made to those rules in particular cases.

But when questions of equity became numerous, they too, were often found to resemble one another; and, requiring a similar decision, were by degrees arranged and classed according to their principles. After a contract, for

example, had been enforced by a general rule, it might happen, on different occasions, that an individual had given a promise, from the undue influence of threats and violence, from his being cheated by the other party, or from advantage being taken of his ignorance and incapacity. On every occasion of this nature an equitable decision was given; and, by an exception to the common rule of law; the promiser was relieved from performance. But, the remedy given in such cases being reduced into a regular system, could no longer be viewed in the light of a singular interposition; and, by the ordinary operation of law, every contract extorted by force, elicited by fraud, or procured in consequence of error and incapacity, was rendered ineffectual. Every primitive rule of justice was productive of numerous exceptions; and each of these was afterwards reduced under general principles; to which, in a subsequent period, new exceptions became necessary: as from the trunk of a spreading tree there issue large branches; each of which gives rise to others, that are lost in various divisions.

Law and equity are thus in continual progression; and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.

Although the chancellor, therefore, was originally entrusted with the mere province of equity, the revolutions of time have unavoidably changed the nature of his jurisdiction. He continues to exert an authority in all such claims as were anciently taken under his protection; but his interpositions concerning them are now directed by general principles, to which various exceptions, according to equity, have since been introduced. He continues, likewise, those modes of procedure which were suitable to his primitive situation, and adapted to such investigations as the purpose of his establishment required.

The ordinary courts of Westminster-hall have, on the other hand, extended their jurisdiction beyond its ancient limits. Though

they originally did not venture to deviate from the rules of strict law, the improvements of a later age have inspired them with a more liberal spirit; and have rendered their decisions more agreeable to the natural dictates of justice.

Thus the court of chancery has been gradually divesting itself of its original character, and assuming that of the courts of common law; while those matters have been, in the same proportion, enlarging their powers, and advancing within the precincts of equity.

According to Justice Blackstone, the essential difference at present, between the chancery and the courts of common law, consists in the modes of administering justice peculiar to each. It may deserve to be remarked, that these differences are such as would naturally arise between courts originally distinguished, by having the separate departments of strict law and equity.

1. From the mode of proof adopted by chancery, all questions which require a reference to the oath of a party are appropriated to that court. This peculiarity arose from an opinion, entertained by early judges, that it was a hard-

ship to compel any person to furnish evidence against himself. But the view suggested by equity was more liberal and refined. It appeared unjust that a defendant should refuse to satisfy a claim which he knew to be well founded; and, unless he was conscious of having fraudulently withheld performance, he could suffer no damage by his judicial declaration.

2. The chancery alone is competent for taking proofs by commission, when witnesses are abroad, or shortly to leave the kingdom, or hindered by age or infirmity from attending. In the courts of common law, the method of trial by a jury was universally established; and as this form required that the witnesses should be examined in court, the interposition of equity was indispensable, to authorize their examination in absence.

3. Instead of awarding damages for neglecting to fulfil a contract, the court of chancery has power to order specific performance. From the narrow principles embraced in early times, by the courts of strict law, no complaint was regarded unless the plaintiff had suffered in his pecuniary interest; and, consequently,

upon the breach of contract, nothing farther could be claimed than reparation of the damage incurred. In a more equitable view, it appeared that every innocent and reasonable purpose of the contractors ought to be enforced; although, perhaps, the loss arising from the failure of performance could not be estimated in money. A court of equity, therefore, was accustomed to enjoin, that a contract should be expressly fulfilled.

4. Two other branches of power are mentioned as peculiar to the court of chancery: the one to interpret securities for money lent. This arose from the prohibition, introduced by the canon law, of taking interest for the loan of money; which occasioned an evasion, by means of what is called a *double bond.* The true construction of this deed, according to the intention of the parties, and in opposition to the words, was beyond the jurisdiction of the ordinary courts. The other branch of power alluded to was that of enforcing a *trust.* This, as I formerly observed, was intended to evade the statute of *mortmain;* and afforded the chancellor the first ground for assuming his extraordinary authority in original actions.

Considering the origin of the court of chancery, there was no reason to expect that its jurisdiction would be separated from that of the ordinary courts by any scientific mode of arrangement. It was the offspring of accidental emergency; being merely a temporary expedient for granting an immediate relief to those who had suffered from legal injustice. Supposing that, after it became a permanent and regular tribunal, it had remained upon its original footing, the advantages likely to have resulted from it may reasonably be called in question. That one court should have a jurisdiction according to strict law, and another according to equity; that the former should be obliged, with eyes open, to pronounce an unjust sentence, in conformity to an old rule, leaving parties to procure relief by application to the latter; that, in a word, the common law tribunal should be empowered to view the law-suit only upon one side, and the court of equity upon a different one; such a regulation appears in itself no less absurd and ridiculous, than its consequences would be hurtful, by producing a waste of time, and an accumulation of expences: not to mention the

uncertainty and fluctuation of conduct arising from the inaccurate and variable boundaries by which equity and strict law must ever be distinguished. Even according to the later form which the chancery has assumed, and by which it has appropriated causes of a very peculiar description, or such as require a singular mode of procedure, its line of partition from the ordinary civil courts may be thought rather arbitrary and whimsical. But, however the present distribution of the judicial powers may be deficient in speculative propriety, it seems in practice to be attended with no inconvenience. The province belonging to each of the courts of Westminster-hall appears now to be settled with an exactness which prevents all interference or embarrassment; and there is, perhaps, no country in the world where equity and strict law are more properly tempered with each other, or where the administration of justice, both in civil and criminal matters, has a freer and more uniform course.

CHAPTER VIII.

Of the Circumstances which promoted Commerce, Manufactures, and the Arts, in modern Europe, and particularly in England.

THE commerce of the ancient world was confined, in a great measure, to the coasts of the Mediterranean and of the Red Sea. Before the invention of the mariner's compass, navigators were afraid of venturing to a great distance from land, and in those narrow seas, found it easy, by small coasting expeditions, to carry on an extensive traffic. Not to mention what is related concerning the fleets of Sesostris and of Solomon, which are said to have been built upon the Red Sea, we may ascribe to this cause the commerce of the Phenicians, the Carthaginians, the Athenians, the Rhodians, and many other states, in the islands and upon the coast of the Mediterranean.

From the time of Alexander the Great, when Greece had become one extensive kingdom, and had formed connections with Asia, the two narrow seas above-mentioned became the channel of a more distant commerce along the Indian ocean, by which the valuable productions of the East were imported into Europe. It was in order to facilitate this traffic, that the city of Alexandria is said to have been built.

The same commerce was carried on, and probably much extended, in the flourishing periods of the Roman empire, when the numerous articles of Asiatic luxury were in such universal request among that opulent people. The decline of the Roman power tended gradually to diminish that branch of trade; but did not entirely destroy it. Even after the downfall of Rome, when Italy had been often ravaged, and a great part of it subdued, by the barbarous nations, there arose upon the sea-coast some considerable towns, the inhabitants of which continued the ancient course of navigation, and still maintained a degree of traffic with India. The road, however, to that country was a good deal changed by the revolutions and disorders which happened in

Egypt, and by the rise of the Saracen empire; so that the Indian trade was carried on less frequently by Alexandria, and most commonly by the Black Sea and part of Tartary, or by a middle way through the city of Bagdad.

During the barbarous period that succeeded the destruction of the Roman empire, the same cause which had formerly promoted the commerce of the Mediterranean, gave rise, in the northern part of Europe, to a small degree of traffic upon the narrow sea of the Baltic. The inhabitants of the southern coast of Scandinavia, and the northern parts of Germany, being necessitated, in that inhospitable climate, to fish for their subsistence, became early acquainted with navigation, and were thereby encouraged not only to undertake piratical expeditions, but also to exchange with each other the rude produce of the country. From the conveniency of that situation, numbers of people were drawn, by degrees, to reside in the neighbourhood, and trading towns were formed upon the coast, or in the mouths of the adjoining rivers. For several centuries, the commerce of the northern part of Europe was engrossed by those towns, in the same man-

ner as that of the southern was engrossed by some of the Italian states. As the laws relating to commerce are usually established by the general custom of merchants, it commonly happens, that the practice of nations who have gained a remarkable superiority in trade, becomes a model for imitation to their neighbours, or such as come after them in the same employment. Thus, as the Rhodian laws at one period regulated the commerce of the ancient world, the statutes of Wisby, the famous capital of Gothland, in the Baltic, obtained a similar authority, and have since been considered, by many European states, as the basis of all their mercantile regulations.

In modern Italy, the maritime laws of Amalphi were, in like manner, respected and observed by the merchants in that part of Europe*. Nothing can shew more decisively the early advances in trade which were made by those towns.

While the inhabitants of those different parts of Europe were thus advancing in navigation and in commerce, they could hardly

* Giannone's Hist. of Naples.

fail to make some progress also in manufactures. By having a vent for the rude produce of the country, they must have had frequent opportunities of observing that, by bestowing a little labour upon their native commodities, they could draw a much greater profit upon the exchange of them. In this manner they were encouraged to occupy themselves in working up the raw materials; to acquire habits of industry; and to make proficiency in mechanical employments. If we examine the history of commercial nations, those especially of the ancient world, we shall find that this has been the usual course of their advancement; and their trade and manufactures have been commonly derived from a convenient maritime situation; which, by affording them the benefit of water-carriage, opened a distant market for their goods, and tempted them to engage in foreign commerce.

The commerce of Italy seems accordingly to have been followed by a rapid improvement of the mechanical arts. In the twelfth and thirteenth centuries, many of the Italian towns had arrived at great perfection in manufactures; among which we may take notice of

Venice, Genoa, Bologna, Pisa, Sienna, and Florence. It was from Italy that the art of making clocks and watches, as well as many other of the finer branches of manufacture, together with the most accurate method of keeping mercantile accompts, was afterwards communicated to the other nations of Europe.

The advancement of the common arts of life was naturally succeeded by that of the fine arts, and of the sciences; and Florence, which had led the way in the former, was likewise the first that made considerable advances in the latter. That city, after having been aggrandized by trade, banking, and manufactures, began, about the middle of the thirteenth century, to discover a taste of elegance and refinement, and to promote the cultivation of letters. Charles of Anjou, who then obtained the kingdom of Naples as a donation from the Pope, and who was, at the same time, the feudal sovereign of Florence, is said to have been a zealous encourager of these liberal pursuits. The example of the Florentines was soon followed by the other states of Italy, in proportion as trades and manufactures had raised them to ease and opulence.

The intercourse of those Italian states with some of the opulent nations of the east, in consequence of the crusades, or of other casual events, may have contributed something towards the revival of letters in Europe. But the operation of this accidental circumstance must have entirely been subordinate to the great natural cause of improvement already suggested. While the inhabitants of Europe continued rude and barbarous, they were not likely to procure much knowledge by their transient or hostile communication with Asia; but after they had acquired a taste for the cultivation of arts and sciences, they, doubtless, found instructors in that part of the world.

As the people upon the coast of the Baltic inhabited a poorer country, the produce of which was not so easily wrought up into valuable manufactures, they made a proportionably slower progress in the mechanical arts; though, by continuing to export their native commodities, they acquired a degree of wealth, and many of their towns became large and powerful. Having been much oppressed, and obstructed in their trade, by the barons and military people in their neighbourhood, they were led by

degrees into joint measures for their own defence; and, about the twelfth century, entered into that famous Hanseatic league, which, being found of great advantage to the commercial interest, was at length rendered so extensive as to include many cities in other parts of Europe.

As the situation of towns, upon the coast of a narrow sea, was favourable to foreign commerce, a country intersected by many navigable rivers gave a similar encouragement to inland trade, and thence likewise to manufactures. An inland trade, however, cannot be rendered very extensive, without greater expence than is necessary to the trade of a maritime town. That all the inhabitants may have the benefit of a market, canals become requisite, where the river-navigation is cut off; roads must be made, where water-carriage is impracticable; machinery must be constructed; and cattle, fit for draught, must be procured and maintained. It may be expected, therefore, that inland trade will be improved more slowly than the commerce which is carried on along the sea-coast; but, as the former hold out a market to the inhabitants of a wider coun-

try, it is apt, at length, to produce a more extensive improvement of manufactures.

We accordingly find, that, after the towns of Italy, and those upon the coast of the Baltic, the part of Europe which made the quickest advances in trade was the Netherlands; where the great number of navigable rivers, which divide themselves into many different branches, and the general flatness of the country, which made it easy to extend the navigation by canals, encouraged the inhabitants to employ themselves in the manufacture of their natural productions.

Beside the facility of water-carriage, the inhabitants of the Netherlands appear to have derived another advantage from the nature of their soil. The two most considerable branches of manufacture, which contribute to supply the conveniencies or luxuries of any people, are the making of linen and of woollen cloth. With regard to the former of these branches, that country seems fitted to produce the rude materials in the greatest perfection. As early as the tenth century, we accordingly find that the people had, by this peculiar circumstance, been excited to attempt the manufacture of

linens; and that, in order to promote an inland trade of this kind, which supposes that the commodity must often be carried to a considerable distance, Baldwin the young, the hereditary count of Flanders, established fairs and markets in particular towns, as the most convenient places of rendezvous between the merchants and their customers.

After the Flemings had made some progress in this trade, and when, of consequence, individuals among them had acquired some stock, as well as habits of industry, they also endeavoured to supply the demand for *woollen* manufactures, which required no very different species of skill and dexterity from what they had already attained. In this employment, however, they were subjected to greater inconveniency; as, after pushing it to any considerable extent, they were under the necessity of purchasing the rude materials from foreign nations. This obliged them to carry on a regular trade with Spain, and with Britain, the two countries of Europe in which wool was produced in greatest abundance. The union, however, of the sovereignty of Spain, with that of the Netherlands, which happened

in the person of the emperor Charles the fifth, contributed in part to remove that inconveniency, by securing to the latter country the wool produced by the former; and the Spanish monarch, who saw the rude materials manufactured within his own dominions, had an opportunity of protecting and encouraging every branch of the labour connected with that employment. From this time the woollen and linen manufactures of the Netherlands came to be in the same flourishing condition.

But while this part of Europe enjoyed such advantages for inland trade, it was not entirely excluded from a share in foreign commerce, by means of Antwerp, and of some other maritime towns in the neighbourhood. The inhabitants of Italy, and of the countries upon the coast of the Baltic, having reciprocally a demand for the commodities produced in such different climates, were led by degrees into a regular traffic. As the ships employed in this extensive navigation, found a convenient middle station in the ports of the Netherlands, the merchants of this country were furnished with opportunities of transporting their

linen or woollen cloths, both to the southern and northern parts of Europe; and a sure market was thus opened for those valuable commodities. It merits attention, that the opulence, thus acquired by Flanders, and the neighbouring provinces of the Low Countries, had the same effect as in Italy, of giving encouragement to literature, and to the cultivation of the fine arts. The rise of the Flemish painters was later than that of the Italian, because the trade of the Netherlands was of a posterior date; and their not attaining the same perfection may, among other causes, be ascribed to this circumstance, that the flourishing trade of that country was of shorter duration.

The encouragement given, in the Netherlands, to painting, was extended also to music, and was productive of a similar proficiency in that art. It is observed, that the Flemings were accustomed, in this period, to supply the rest of Europe with musicians, as is done in our days by the Italians*.

Towards the end of the sixteenth, and the

* See Reflections on Poetry, Painting, and Music, by the Abbé du Bos.

beginning of the seventeenth century, three great events concurred to produce a remarkable revolution upon the state of trade and manufactures in general, and that of Europe in particular.

1. The first of these was the invention of the mariner's compass; which changed the whole system of navigation, by enabling navigators to find their way with certainty in the wide ocean, to undertake more distant expeditions, and to complete them with much greater quickness. When this discovery had been properly ascertained, and reduced to practice, those who inhabited the coast of a narrow sea had no longer that superiority, with respect to commerce, which they formerly possessed; for, whatever advantages they might have in a small coasting navigation, these were overbalanced by the inconveniencies of their situation, whenever they had occasion to sail beyond those adjacent capes or promontories by which they were limited and circumscribed. The harbours, which became then most favourable to commerce, were such as had formerly been least so; those which were the farthest removed from streights, or dangerous

shores, and, by their distance from opposite lands, admitted the freest passage to every quarter of the globe.

2. The discovery of America, and the opening of a passage to the East-Indies by the Cape of Good Hope, which may be regarded as a consequence of the preceding improvement in navigation, contributed still farther to change the course of European trade. By these discoveries a set of new and magnificent objects of commerce was presented, and Europe began to entertain the prospect of forming settlements in distant countries; of trading with nations in various climates, producing a proportional variety of commodities; and of maintaining an easy correspondence between the remotest parts of the world. The merchants of Italy, and of the northern parts of Germany, were naturally left behind, in the prosecution of these magnificent views. Their situation, hemmed in by the coast of the Baltic, or of the Mideterranean, was particularly unfavourable for that new species of trade. They had, besides, a reluctance, we may suppose, to abandon their old habits, and to relinquish that settled traffic in which they

had been long engaged, for the new and hazardous adventures which were then pointed out to them. Adhering, therefore, to their former course, they found their profits decrease, according as the new commerce became considerable; and their commercial importance was at length, in a great measure, sunk and annihilated.

3. The violent shock given, by the Spanish government, to the trading towns of the Netherlands, occasioned, about this period, a change in the manufactures of Europe, no less remarkable than the two foregoing circumstances produced in its commerce. Philip the second of Spain embraced the narrow and cruel policy of his father Charles the fifth, in attempting to extirpate the doctrines of Luther throughout his dominions; at the same time that he added a bigotry, peculiar to himself, which led him to seek the accomplishment of his purpose by measures yet more imprudent and sanguinary. The doctrines of the reformation had been spread very universally in the Netherlands; and had been adopted with a zeal not inferior to that which appeared in any other part of Europe. Philip employed

the whole force of the Spanish monarchy in order to subdue that spirit of religious innovation; and, after a long and obstinate struggle, he at last prevailed; but it was by extirpating a great part of the inhabitants, and ruining the manufactures of the country. The most independent and spirited, that is, the most active and skilful part of the manufacturers, disdaining to submit to a tyranny by which they were oppressed in their most valuable rights, fled from their native country; and, finding a refuge in other European nations, carried along with them that knowledge and dexterity in manufactures, and those habits of industry, which they possessed in so eminent a degree.

Of all the European nations, Great Britain was in a condition to reap the most immediate profit from these important changes in the state of commerce and manufactures.

England has long enjoyed the peculiar advantage of rearing a greater number of sheep, and producing larger quantities of wool, fit for manufacture, than most other parts of the world. This is probably derived from the flatness of the country, by which a great part

of it is plentifully supplied with moisture, and from the moderate temperature of its climate; both of which circumstances appear favourable to the production of pasture, and to the proper cultivation of sheep. But, whatever be the causes of it, the fact is certain, that, Spain excepted, no other country can, in this particular, be brought in competition with England. Particular mention is made of the English wool, even when Britain was a Roman province; and, in the early periods of our history, the exportation of that commodity was a considerable article of commerce. What is remarkable, the English wool of former times appears to have been of a finer quality than the present; and there is even reason to believe that it was held superior to the Spanish*. Of this extraordinary fact it seems difficult to give any satisfactory account. I am credibly informed, that the improvements, made of late years, in the pasture-grounds of England, have greatly debased the quality of the wool; though, by the increase

* See Observations upon National Industry, by James Anderson, and the authorities to which he refers.

of the quantity, they have sufficiently indemnified the proprietors.

By possessing the raw material in great plenty, the English appear to have been incited, at an early period, to make some attempts toward the fabrication of it. The woollen cloth of England is taken notice of while the country was under the dominion of the Romans. The disorders which followed while the Saxons were subduing the country, and during the subsequent ravages of the Danes, gave great interruption to manufactures; but, soon after the Norman conquest, and particularly in the reigns of Henry the third and Edward the first, that of woollen cloth appears to have become an object of attention.

The flourishing reign of Edward the third was extremely favourable to improvements; and that enterprising monarch, notwithstanding his ardour in the pursuit of military glory, was attentive to reform the internal policy of the kingdom, and gave particular encouragement to the woollen manufacture. He invited and protected foreign manufacturers; and, in his reign, a number of Walloon weavers, with their families, came and settled in Eng-

land. An act of parliament was made, which prohibited the wearing of foreign cloth; and another, by which the exportation of wool was declared to be felony. These regulations, however narrow the principles upon which they were built, were certainly framed with the best intentions; but they could have little or no effect, as the English at that time, were neither capable of manufacturing the whole of their wool, nor even supplying their own demand for woollen cloth. The crown, therefore, in virtue of its dispensing power, was accustomed to relieve the raisers of wool, by granting occasionally, to individuals, a licence for exportation: and, as a dispensation in this case was absolutely necessary to procure a market for the commodity, it became the source of a revenue to the sovereign, who obtained a price for every licence which he bestowed.

The woollen trade of England made considerable advances in the reign of Henry the seventh, when, after a long course of civil dissension, the people began to enjoy tranquillity under a prince who favoured and protected the arts of peace. About this time were set on foot the coarse woollen manufactures of York-

shire; particularly at Wakefield, Leeds, and Halifax; places remarkably well adapted to that species of work, from the plenty of coal, and the numerous springs of water with which they are supplied.

The extension of manufactures, about this period, became so considerable as to produce an alteration in the whole face of the country; and, in particular, gave rise to improvements in husbandry, and in the different arts connected with it. The enlargement of towns and villages, composed of tradesmen and merchants, could not fail to increase the demand for provisions in the neighbourhood, and, by enhancing the value of every article raised by the farmers, to advance the profits of their employment. From this improvement of their circumstances, the tenants were soon enabled, by offering an additional rent, to procure leases for a term of years; and the master, whose daily expences were increased by the progress of trade and luxury, was content to receive a pecuniary compensation, for the loss of that authority over his dependants, which he was obliged to relinquish. Thus the freedom and independence, which the mercantile

and manufacturing people derived from the nature of their employment, was, in some measure, communicated to the peasantry; who, instead of remaining tenants at will, were secured for a limited term in the possession of their farms.

In consequence of these changes, the number of villeins in England was greatly diminished, in the reign of Henry the seventh; and before the accession of James the first, that class of men had entirely disappeared. Without any public law upon the subject, their condition was gradually improved by particular bargains with their master; and, according as their opulence enabled them to purchase higher privileges, they acquired longer leases, or were converted into *copyholders* or *freeholders*.

As, from this time, the English continued, with unremitting ardour, to prosecute their improvements, and were continually advancing in opulence, as well as in skill and dexterity, and in the habits of industry, it was to be expected that, in the long run, the possession of the rude material of the woollen manufacture would give them a manifest superiority

in that branch of business, and put it in their power to undersell other nations who had not the same advantage.

In the reign of queen Elizabeth, that severe blow, which I formerly mentioned, was given to the trade of the Low Countries; by which every branch of manufacture was greatly impaired, and that of woollen cloth was totally destroyed. Thus the destruction of the woollen trade of the Netherlands happened at the very critical period, when the English were come to be in a condition of turning that event to their own emolument. The manufacturers who had been driven from their native land found a welcome refuge from queen Elizabeth; and the greater part of them took up their residence in England; so that the inhabitants of the former country became, in the highest degree, instrumental in promoting the trade of the latter; instead of retarding or depressing it, by that superiority of industry and skill, and that uninterrupted possession of the market which they had long maintained.

In Spain, the only other country of Europe enjoying similar advantages to those of Eng-

land, the improvement of the woollen manufacture was prevented by a variety of concurring circumstances. The rooted animosity between the professors of the Christian and Mahometan religions, cherished by the remembrance of many acts of cruelty and oppression, had excited Ferdinand of Arragon, when he became master of the country, to persecute the Moors, the only industrious part of the inhabitants. In a subsequent reign, they were entirely extirpated. The same imprudent and barbarous policy interrupted and discouraged the trade of the Netherlands; and, after these two fatal events, the sudden importation of gold and silver into Spain, in consequence of the possession of America, completed the destruction of industry among the people, by raising individuals to sudden wealth, and making them despise the slow and distant returns of trade and manufactures.

Upon the ruin of the Spanish Netherlands, were established the fine woollen manufactures of Wiltshire, and some of the neighbouring counties; those parts of England which produced the greatest number of sheep,

and in which the superior quality of the wool was most remarkable. The rapid improvements in that great branch of manufacture, which became conspicuous in England, had a natural tendency to introduce other branches, more or less connected with it; and, when a great body of the people had acquired industry and skill in one sort of employment, it was not very difficult, as occasion required, to extend their application to other trades and professions.

While these circumstances bestowed upon England a superiority in manufactures, she began to enjoy advantages no less conspicuous, with regard to navigation and commerce. When the people of Europe had become qualified for extensive naval undertakings, the distance of Britain from the continent, and her situation as an island, afforded her a superiority to most other countries in the number of such harbours as have a free communication with all parts of the globe. Her insular situation was, at the same time, no less advantageous with respect to inland trade, from the numerous bays and rivers, which, by intersecting

the country in different places, extended the benefit of water-carriage to the greater part of the inhabitants. As the bulk of the people became thus familiar with the dangers and vicissitudes incident to those who live upon water, they acquired habits which fitted them for a seafaring life, and rendered them dextrous in those arts which are subservient to navigation, the great instrument of commerce. In these circumstances, there has been formed a numerous body of sailors, equally prepared for commercial and for military enterprises. As, in the early state of the feudal nations, the great body of the people were, without labour or expence, qualified for all the services of the field; so, in Britain, a great proportion of the inhabitants, after the advancement of commerce, became a sort of naval militia, ready, upon all occasions, for the equipment of her fleets, and, without the assistance of *navigation acts*, or other precautions of the legislature, fully sufficient for the defence of the country.

These advantages, however, were rendered more stable and permanent by the great extent of this island, superior to that of most others

upon the globe. This, as it united the inhabitants in one great state, made them capable of exerting a force adequate to the protection of its commerce and manufactures. To the extent of her dominions Great Britain is indebted for her long-continued prosperity. The commercial states, both in ancient and modern times, which were formed in islands of small extent, have been frequently overturned in a short time, either by the jealousy of neighbours, or by an accidental collision with more powerful nations. The present combination of European powers against Great Britain, demonstrates the jealousy which a national superiority in trade is likely to excite, and the force which is necessary to maintain that dangerous pre-eminence*.

That the government of England, in that period, had also a peculiar tendency to promote her trade and manufactures, it is impossible to doubt. As the inhabitants were better secured in their property, and protected from oppressive taxes, than in any other European kingdom, it is natural to suppose that their in-

* This was written before the peace in 1782.

dustry was excited by the certain prospect of enjoying whatever they should acquire. Though the English constitution was then destitute of many improvements which it has now happily received, yet, compared with the other extensive governments of Europe in that age, it may be regarded as a system of liberty.

CHAPTER IX.

Of Henry the Seventh.—Circumstances which, in his reign, contributed to the Exaltation of the Crown.—Review of the Government of this period.

IN the reign of Henry the seventh, the power of the crown, which had been gradually advancing from the Norman conquest, was exalted to a greater height than it had formerly attained. The circumstances which produced this alteration, either arose from the general state of the country, and the natural tendency of its government; or were the consequence of singular events, and occasional conjunctures.

1. The improvements in agriculture, and in trade and manufactures, which appeared so conspicuously from the accession of the Tudor family, contributed, more than any other circumstance, to increase the influence and authority of the crown. By these improvements, persons of the lower class were led to the ac-

quisition of different privileges and immunities; instead of remaining in the idle state of retainers, they found employment either as farmers, who paying a fixed rent, were exempted from the arbitrary will of a master, or as tradesmen and merchants, who, at a distance from any superior, were enriched by the profits of their industry. These circumstances naturally produced that spirit of independence which is so favourable to civil liberty, and which, in after times, exerted itself in opposition to the power of the crown. But such was the situation of the great body of the people, upon their first exaltation, that, instead of attempting to depress, they were led to support the political influence of the monarch. His protection they had formerly experienced, in opposition to those great proprietors of land in their neighbourhood, by whom they had been oppressed, and who still were endeavouring to retain them in subjection. Notwithstanding the change of their condition, their power was not so established as to enable them, alone and unprotected, to withstand these ancient oppressors; and from their former habits, as well as from the dan-

gers and difficulties which were not yet entirely removed, they still adhered to the sovereign as their natural protector. In this peculiar state of things, the interest of the crown coincided with that of the great body of the people; while the ambition of the nobles appeared equally inconsistent with both. To humble the aristocracy was therefore the first aim of the lower order of the inhabitants; but, in their attempts to destroy two or three hundred petty tyrants, they incurred the hazard of raising up a single one more powerful than them all.

This union of the crown with the great body of the people, at the same time that it primarily increased the authority of the monarch, contributed indirectly to preserve the ancient privileges of parliament. As the house of commons, which daily rose to higher consideration, was in the interest of the king, and usually supported his measures if not extremely odious and oppressive, he found it expedient to call frequent meetings of that assembly. Thus the very power, which the interpositions of parliament were calculated to restrain, invited and prompted this national

council to exercise its rights; because, in the exercise of them, it was disposed to gratify the inclination or humour of the sovereign, who regarded present convenience more than the future effects of example.

The same views of interest, which led the king to call frequent meetings of parliament, induced him to bestow additional weight upon the house of commons, by increasing the number of its members. For this purpose, many small towns, upon the demesne of the crown, were incorporated, and invested with all the privileges of royal boroughs; in consequence of which they became entitled to send the usual number of burgesses to parliament. In other towns, which had anciently been incorporated, but which had long neglected to send representatives, that obligation was renewed and enforced. The poorer and more insignificant these boroughs were, they promoted more effectually the design with which they were created; being so much the more dependant upon the sovereign, and the more likely to choose representatives willing to follow his direction.

During the reigns of the Tudor princes,

after that of Henry the seventh, and even upon the accession of the Stewart family, this expedient was put in practice to a great extent, and apparently with great success. Henry the eighth restored, or gave, to twelve counties, and to as many boroughs in Wales, the right of sending, each, of them one representative. In other parts of his domain he also created eight new boroughs, requiring two delegates from each. Edward the sixth created thirteen boroughs; and restored ten of those which had given up the right of representation. Mary created ten, and renewed the ancient privilege in two. In the reign of Elizabeth, no fewer than twenty-four parliamentary boroughs were created; and seven were restored. James the first created six, and restored eight. Charles the first restored nine. From each of these boroughs two representatives appear to have been admitted*.

The circumstances now mentioned will, in a great measure, account for that very unequal representation in parliament, which has been so often and so justly complained of. No view of national utility could ever have pro-

* See Notitia Parliamentaria, by Browne Willis.

duced so gross an absurdity. But, as the king had an interest in augmenting the house of commons, in order, with their assistance, to counteract the influence of the peers; so by multiplying the small and insignificant boroughs, he secured a more numerous party in that house, and was enabled, with greater facility, to over-rule its determinations.

2. The occurrences which had preceded the accession of Henry the seventh, and the general disposition which these had produced in the nation, were likewise highly favourable to the interest of the monarch. During the long and bloody civil war between the houses of York and Lancaster, every person of distinction had been engaged in supporting one or other of the competitors; and, from the various turns of fortune exhibited in the progress of the contest, had alternately fallen under the power of the adverse party. At the final determination of the dispute, many of the great families were totally ruined; all of them were much exhausted and weakened. The dignity of the crown had, indeed, from the same causes, been also greatly impaired. But the royal demesnes were not so liable to be dis-

membered as those of the nobility; and, upon the restoration of public tranquillity, the numerous resources of the monarch, which were all directed to the same object, afforded him great advantages, in extending his authority over a broken and disjointed aristocracy. During the alternate government of the two contending branches of the royal family, the partisans of both had probably occasion to think their services undervalued; and to be disgusted with the system of administration which prevailed. Henry the sixth, in whom the line of Lancaster forfeited the crown, had, by his incapacity, excited universal contempt. The crimes of Richard the third, the last monarch of the house of York, had rendered him the object of horror and detestation. Time and experience had gradually abated the zeal of party; and the nation, tired in wasting its blood and treasure in so unprofitable a quarrel, was become willing to adopt any system that promised a removal of the present disorders. Henry the seventh, accordingly, obtained the crown by a sort of compromise between the two parties; being the acknowledged head of the house of Lan-

caster; and having come under a solemn engagement to marry Elizabeth, the daughter of Edward the fourth, and now heiress of the house of York. In that conjuncture a better bargain for the Yorkists, or one more likely to promote the general interest of the nation, could hardly be expected. Henry was the deliverer of his country from the tyranny of Richard; and appears to have been the only person possessed of such credit and influence, as were necessary to hold the sceptre with steadiness, and to create the expectation of a quiet and permanent reign. The same views and dispositions which had established this prince upon the throne, were likely to produce a general submission to his authority, and aversion to every measure which might occasion fresh disturbance, or threaten once more to plunge the nation into the former calamities.

3. The personal character of Henry was calculated for improving, to the utmost, the advantages which he derived from his peculiar situation. Less remarkable for the brilliancy of his talents, or the extent of his genius, than for the solidity of his judgment, he discovered uncommon sagacity in discerning his own in-

terest, and unremitting assiduity and vigour in promoting it. His great objects were, to maintain the possession of the throne, to depress the nobility, and to exalt the prerogative; and these he appears to have invariably pursued, without being ever blinded by passion, relaxed by indolence, or misled by vanity. Cautious in forming no visionary or distant schemes, he was resolute in executing his measures, and dextrous in extricating himself from difficulties. In war he displayed activity, valour, and conduct, and was fortunate in all his undertakings; but he seems to have engaged in them from necessity, or from the prospect of emolument, more than from the desire of procuring military reputation. Full of suspicion, he admitted no person to his confidence; but assumed the entire direction of every public department; and was even attentive to the most minute and trivial concerns. His ministers were generally ecclesiastics, or men of low rank; and were employed as the mere instruments of his government.

The jealousy which Henry discovered of all the friends of the York family, and the severity with which he treated them, have been

usually censured as illiberal and impolitic. To the praise of liberal views and sentiments, this monarch had certainly no claim. But that this plan of conduct was contrary to the maxims of sound policy, may perhaps be doubted. When a political junto is so much broken and reduced as to be no longer formidable, prudence seems to require that its members should not be pointed out by invidious distinctions; but that, by gentle treatment, they should be induced to lay aside their peculiar principles and opinions. But when the individuals of an unsuccessful party are still possessed of so much power, as to afford the prospect of rising to superiority in the state, it is vain to expect that their attachment will be secured by marks of confidence and favour. Hope co-operates with resentment, to keep alive the spirit of opposition; and the participation of honours and emoluments is only furnishing them with weapons for the destruction of their political enemies. Such was the situation of the numerous adherents of the house of York. They had, indeed, yielded to the exigency of the times; but they were still possessed of much influence, and were far

from being thoroughly reconciled to the advancement of a family which they had so long opposed.

From the imputation of avarice the character of Henry cannot so easily be vindicated. That vice, it should seem, was equally promoted by those habits of minute attention for which he was noted, and by the circumstances of the crown during the period in which he lived. In the present age, when the chief support of a government is derived from taxes, and when it is regarded as a duty upon the people to supply all the deficiencies of the public revenue, the disposition of the king to accumulate wealth would be a most extravagant and ridiculous propensity. But in those times, when the private estate of the sovereign was the principal fund for defraying his expences, and when every new exaction from his subjects was deemed a general grievance, he had the same interest with every other individual to practise œconomy; and his love of money might be in reality the love of independence and of power. In all countries, accordingly, in which commerce and the arts have made little progress, it becomes

the aim of every wise prince, by frugality in time of peace, to prepare for war by amassing a treasure. "Whereunto," says my Lord Bacon, in his character of Henry the seventh, "I should add, that having every day occasion "to take notice of the necessities and shifts "for money, of other great princes abroad, it "did the better, by comparison, set off to him "the felicity of full coffers."

The use that might be made of the advancement of the commons, in raising the power of the crown in opposition to that of the nobility, seems not to have escaped the penetration of Henry; and in the statutes which passed in his reign, we discover the policy of the monarch, co-operating with the natural improvements of society, in diminishing the influence of the aristocracy.

The artifice of entails, rendered effectual by a statute, in the reign of Edward the first, had for a long time prevented the barons from dismembering their estates. But the general propensity to alienation, arising from the advancement of commerce and manufactures, became at length so strong, that it could no longer be withstood by such unnatural re-

straints. When a law is directly contrary to the bent of a whole people, it must either be repealed or evaded. In the reign of Edward the fourth, the device of a *common recovery*, that is, a collusive judgment by a court of justice, was accordingly held sufficient to defeat an entail: For the same purpose, the ingenuity of lawyers had suggested the expedient of a *fine*, or collusive agreement, entered upon the records of a court; to which Henry the seventh, by an act of parliament, in the fourth year of his reign, procured the sanction of the legislature. Thus, by the dissolution of entails, an unbounded liberty was given to the alienation of land; and by the growing luxury of the times, a great part of the wealth, which had been artificially accumulated, in the possession of the nobility, was gradually dissipated and transferred to the commons. Whatever might be the ultimate consequences of this alteration, its immediate effects were undoubtedly advantageous to the monarch.

The wealth of the barons being lessened, while their manner of living was becoming more expensive, they were laid under the ne-

cessity of reducing the number of their military servants. This change in the situation of the nobility, so conducive to the good order of the kingdom, parliament had repeatedly endeavoured to promote, by prohibiting their keeping retainers in liveries, for the purpose of assisting them in their quarrels; a regulation which Henry is said to have exerted the utmost vigilance and activity to enforce.

Many other regulations were introduced in this reign, by tending to improve the police, and to promote the industry and the importance of the lower orders of the people, contributed more indirectly to the same political changes.

From these concurring circumstances, the prerogative was, no doubt, considerably advanced, after the accession of Henry the seventh. Its advancement, however, appears not so much in the assumption of new powers by the monarch, as in the different spirit with which the ancient powers began to be exercised. This will be evident from an examination of the different branches of government which custom had then appropriated to the king, and to the national assembly.

The legislative power, in conformity to the ancient constitution, was, without all question, exclusively vested in parliament; as the executive power, that of declaring peace and war, of levying troops, of commanding the armies, and, in general, that of providing for the national defence, was committed to the king. There were two methods, however, by which, upon some occasions, the king evaded or encroached upon this power of parliament.

When a statute prohibited any action, or enjoined any rule of conduct, the king, as representing the community, might remit the penalties incurred by the transgression of it. From a step of this nature it was thought no considerable stretch, that he should previously give to individuals a dispensation from the observance of the law; since the latter seemed to be nothing more than a different mode of exercising a power which he was universally allowed to possess. To pardon a criminal, after he has been guilty, is indeed less dangerous to society than to give a previous indulgence to the commission of crimes; but in a rude age, this difference was likely to be overlooked. Hence the origin of the *dispensing power*;

which was early exercised by the sovereign; and which, as long as it was kept within a narrow compass, appears to have excited little attention. By degrees, however, these extraordinary interpositions of the crown were multiplied, and extended to things of greater importance; and in some cases, instead of granting a mere exemption to particular persons, were at length carried so far as at once, by a general dispensation, to suspend all the effects of a statute. This last exertion of the regal power, which was of much greater magnitude, appears to have been, in some measure, concealed under the mask of the former; and had never been avowed as a distinct branch of the prerogative*. It was indeed impossible that the parliament could admit such a claim of the sovereign, without surrendering to him its legislative authority.

* See the trial of the Bishops in the reign of James II. In the course of that trial, in which all the lawyers of eminence were engaged, and contended every point with great eagerness, it is asserted by the counsel for the bishops, and not contradicted on the other side, that from the Norman conquest, until the accession of the house of Stewart, a general power of suspending or dispensing with the law had never been directly claimed by the crown.

The general suspension of a law is equal to a temporary abrogation; and therefore can only proceed from the same power by which the law was made.

But the dispensing power of the crown, even in favour of particular persons, had been virtually disallowed and reprobated in parliament. In the reign of Richard the second, a power was granted to the king of *making such sufferance, touching the statute of provisors as should seem to him reasonable and profitable.* But this statute, at the same time that it implies his having, of himself, no such authority, allows this power only until the next parliament; and contains a protestation, that it is a *novelty*, and that it shall not be drawn into example for the time to come*.

* The statute, which passed in the fifteenth of Richard the second, is as follows, "Be it remembered, touching "the statute of *Provisors*, that the commons (for the great "confidence which they have in the person of our lord the "king, and in his most excellent knowledge, and in the "great tenderness which he hath for his crown, and the "rights thereof, and also in the noble and high discretion "of the lords) have assented in full parliament, that our "said lord the king, by advice and assent of the said lords, "*may make such sufferance, touching the said statute, as shall*

As the king attempted, in some cases, to interrupt the course of the statutes already

" *seem to him reasonable and profitable, until the next parlia-*
" *ment,* so as the said statute be not repealed in no article
" thereof: and that all those who have any benefices by
" force of the said statute, before this present parliament;
" and also that all those, to whom any aid, tranquillity or
" advantage is accrued by virtue of the said statute, of the
" benefices of holy church (of which they were heretofore
" in possession) as well by presentation or collation of our
" lord the king, as of the ordinaries or religious persons
" whatsoever, or by any other manner or way whatsoever;
" may freely have and enjoy them, and peaceably continue
" their possession thereof, without being ousted thereof, or
" any ways challenged, hindered, molested, disquieted, or
" grieved hereafter, by any provisors or others, against the
" form and effect of the statute aforesaid, by reason of the
" said sufferance, in any time to come. And moreover, that
" the said commons may disagree, at the next parliament,
" to this sufferance, and fully resort to the said statute, if it
" shall seem good to them to do it: with *protestation,* this
" assent, which is a *novelty,* and has not been done before
" this time, *be not drawn into example or consequence,* for
" time to come. And they prayed our lord the king, that
" the protestation might be entered of record in the roll
" of parliament: and the king granted and commanded to
" do it."

The statute of *Provisors* had prohibited, under severe penalties, the procuring or accepting ecclesiastical benefices from the pope; and it is evident that, by the present act of

made; so he endeavoured, sometimes, by his commands, to supply the place of new regulations. In the character of chief magistrate, he assumed the care of maintaining the police of the kingdom; and, in order to put his subjects upon their guard, so that none might pretend ignorance of the duties required of them, he frequently issued proclamations, with respect to those rules of conduct which he had occasion to enforce. But as these commands of the sovereign were not always confined to the mere execution of the laws already in being, it was not easy for the people at large to distinguish in what cases they exceeded that boundary, or to determine the degree of obedience to which they were strictly entitled. As, however, few would be willing to incur the king's displeasure by calling their validity in question, the royal proclamations were allowed to advance in authority, according to the increasing influence and dignity of the crown. In the reign of Henry the seventh,

parliament, it was intended that the king should dispense with that statute in favour of particular persons only, not that he should all at once suspend the effect of it. Even this dispensation to individuals is termed a *novelty*.

they rose to higher consideration than they had possessed in any former period. But even in this reign, it is not pretended that they had the force of laws; nor does it appear that they were made effectual by the ordinary courts of justice.

2. Under the legislative power was included that of determining the rules by which the people should contribute to defray the expence of government. The right of imposing taxes had therefore been invariably claimed and exercised by parliament. But, in order to procure money, without the authority of that assembly, the king had recourse to a variety of expedients.

The first, and most obvious, was that of soliciting a *benevolence*. This was originally a contribution made by the king's immediate vassals; but, from a relaxation of the ancient feudal principles, had afterwards, in the reign, it should seem, of Edward the fourth, been extended over the whole kingdom*. It was always, except in three singular cases, consi-

* This extension of a *benevolence* is probably what is meant by Lord Bacon, when he says, "This tax was devised by "Edward the fourth, for which he sustained much envy."

dered as a free gift; and could not be levied, by force, from such as persisted in refusing it. But although the people were not bound, in law, to contribute; they had every inducement from expediency; since a refusal was likely to be attended with greater inconveniency than the payment of the money which was demanded. From the discretionary power of executing the law, the crown had many opportunities of harassing those who shewed themselves unwilling to relieve its necessities; and seldom could fail to make them heartily repent of their obstinacy. In particular, from the direction of the army, the king had the power of quartering troops in any part of the kingdom; by which means he was enabled, however unjustly, to create expence and vexation to such of the inhabitants as had not complied with his demands. The very solicitation of a benevolence upon the part of the crown, was therefore justly regarded in the light of hardship; and, in the preceding reign, appears to have been, in every shape, condemned and prohibited by parliament; which provides, "that the king's subjects shall from hence-"forth, in no wise, be charged by such charge,

" exaction, or imposition called a *benevolence*,
" nor by such like charge; and that such ex-
" actions called *benevolences*, before this time
" taken, be taken for no example, to make any
" such, or any like charge of any of the king's
" subjects hereafter, but shall be *damned and*
" *annulled for ever**."

Notwithstanding the violence with which the legislature had thus testified its disapprobation of this practice, we find that in the seventh year of Henry the seventh, the parliament, upon occasion of a war with France, expressly permitted the king to levy a *benevolence*. That this, however, was intended as a mere voluntary contribution, appears from the account of it given by Lord Bacon, who says, it was to be levied *from the more able sort*, and mentions a tradition concerning the arguments which the commissioners for gathering the benevolence were instructed to employ; " that,
" if they met with any that were sparing, they
" should tell them, that they must needs have,
" because they laid up; and if they were spend-
" ers, they must needs have, because it was
" seen in their port, and manner of living: so

* 1 Richard III. c. 2.

" neither kind came amiss." This was called by some bishop Morton's *fork*, by others his *crutch**.

In a few years after, parliament made what my Lord Bacon calls *an underpropping act of the benevolence*, by ordaining that the sums, which any person had agreed to pay, might be levied by the ordinary course of law. This act, however, still supposes that, independent of the consent of the party, no contribution of this nature could ever be made effectual.

Beside the benevolence formerly mentioned, which was obtained by the permission of the legislature, there was only one more levied by Henry the seventh. On all other occasions, the general assessments procured by this monarch were supported by the authority of parliament, and imposed in the direct form of a tax.

When the kings of England had reason to suspect that the benevolence of their subjects might be exhausted, they had sometimes recourse to another expedient, that of requesting a *loan*. This mode of relief, as it strongly

* Hist. of the reign of Henry the seventh.

marked the necessities of the crown, and its reluctance to burden the people, and required no more than the temporary use of their money, could with less decency be withheld. But, in reality, a loan, when granted to the sovereign, come to be nearly of the same amount with a benevolence. From the condition of the debtor, he could never be compelled to do justice to his creditors; and his circumstances were such as always afforded plausible pretences for delaying and evading re-payment. Although the nature of a loan, implying a mutual transaction, appeared to exclude any idea of right in demanding it, yet the same indirect methods might easily be practised by the crown for procuring a supply in this manner, as under the form of a benevolence. We accordingly find, that in a parliament, as early as the reign of Edward the third, the commons pray the king, "that the loans which were granted to "the king by many of that body may be releas-"ed; and none compelled to make such loans "for the future against his will, for that it was "against reason and the franchise of the land; "and that restitution might be given to those

"who had made the loans." The king's answer was, "that it should be done*." It does not appear that Henry the seventh ever practised this mode of exaction.

Purveyance was another species of exaction, by which the people were exposed to great vexation from the crown. It was requisite that the king and his followers, who in early times were frequently moving over different parts of the country, should, wherever they came, be speedily supplied with provisions. Instead of making, therefore, a previous bargain with the inhabitants, the officers of the crown were accustomed to lay hold of such commodities as were wanted, leaving commonly the indemnification of the proprietors to some future occasion. It may easily be supposed, that this practice was liable to much abuse, and that those whom the king employed in this department would endeavour to make profit at the expence of the people. The number of statutes, that, from the reign of Edward the first, were made for preventing the fraud and oppression of the king's purveyors, afford suffi-

* 26th of Edward III. See Parliamentary History in that year.

cient evidence of the great enormities with which that set of people had been charged, and of which they probably were guilty*.

It must not be overlooked, that, from the exclusive power of making laws, with which parliament was invested, that assembly had the privilege of restraining these, and all other arbitrary proceedings of the crown. Its exertions for this purpose, however, were frequently interrupted or prevented by the want of a fixed rule with respect to the times of its meeting.

Upon the disuse of the ancient practice, by which parliaments had been regularly held at the three stated festivals of Easter, Whitsuntide, and Christmas, the power of convening those assemblies devolved entirely upon the king. The magistrate, entrusted with the supreme execution of the laws already existing, was the best qualified to discover, in what cases these were defective, and upon what occasions a new interposition of the legislature was requisite. In that simple age it was perhaps not apprehended that, with a view of extending the

* See 28 Edw. I. c. 2.—4 Edw. III. c. 4.—5 Edw. III. c 2.—10 Edw. III. stat. 2.—25 Edw. III. stat. 5.—36 Edw. III.—1 Rich. II. c. 3.—6 Rich. II. stat. 2. c. 2.—23 Hen. VI.

prerogative, he would be disposed to avoid the meetings of parliament; or rather, the barons trusted, that, whenever they had a mind, they could compel him to summon those meetings. But when experience had shewn the abuses in this particular, which were likely to arise, it was thought proper that the discretionary power of the crown should be limited; and accordingly, by a statute in the fourth year of Edward the third, it was expressly provided, that "a parliament shall be held every year "once, and oftener if need be." By another statute, in the thirty-sixth year of the same reign, this regulation is confirmed*. In a subsequent period, when the house of commons had begun to throw considerable weight into the scale of the crown, it became the interest of the king to summon frequent meetings of parliament; and the nobility were, of consequence, less anxious to enforce this branch of his duty. Henry the seventh, during a reign of twenty-three years, had occasion to convene seven different parliaments.

To dissolve a parliament was originally no-

* Statutes at large.

thing more than to put an end to the attendance of its members; with which, as it saved them from farther expences, they were commonly well satisfied. Before the introduction of representatives into that assembly, every new meeting of the barons was properly a new parliament; and there could be no distinction between a *dissolution* of parliament and a *prorogation*. But, after the establishment of the house of commons, which consisted of members whose election was attended with trouble and expence, it became convenient that the same parliament should, in some cases, be prolonged, and that there should be intervals in its meeting. When the meetings of parliament came thus to be divided into different sessions, the power of proroguing a parliament from one session to another, like that of dissolving it, was devolved upon the crown; and, for a long time, this branch of the prerogative was exercised within such narrow limits as to excite no apprehension or jealousy. The danger of allowing too great an interval between one parliament and another, as well as that of permitting the king to reign entirely without a parliament, was always manifest; but the mischiefs arising

from the long continuance of the same parliament; the reducing the members of the house of commons, more immediately, under the influence of the crown, and rendering them less dependent upon their constituents; in a word, the erection of the national assembly into a standing senate, and destroying, or at least greatly impairing, its representative character; these evils had never been felt, and, in that early age, were not likely to be foreseen.

3. With respect to the judicial power, it must be acknowledged, that the extent of the prerogative was, in several respects, incompatible with an equal and proper distribution of justice.

The nature and origin of the *star-chamber* have been formerly considered. This court consisted of the king and his privy-council, together with the judges of the principal courts, and such other persons as, in each particular case, he thought proper to nominate; and was intended for the determination of such criminal actions as were beyond the jurisdiction of the ordinary tribunals. Being calculated to supply the deficiency of the common rules of penal law, like the chancery in those relating

to civil rights, it was regarded, in early times, as an institution of great utility. But, as the limits of its jurisdiction could not be ascertained with accuracy; as the actions of which it took cognizance related principally to crimes affecting the state, in which the crown was immediately interested; and as the king, by sitting in this tribunal, was enabled to controul and direct its decisions; we have every reason to believe that its proceedings were partial and arbitrary, and that it might easily be employed as an engine of ministerial oppression. According as the crown rose in authority, the jurisdiction of this court was enlarged; and being, in certain cases, confirmed by act of parliament, in the reign of Henry the seventh, was, by the subsequent princes of the Tudor line, rendered yet more instrumental in promoting the incroachments of the monarch.

When a military enterprize had occasioned the levying of troops, it was necessary that among these a stricter and more severe discipline should be enforced, than among the rest of the people. Hence the origin of the *martial law*, as distinguished from the common law of the kingdom. As, according to the policy

of the feudal governments, the king had the power of calling out into the field all his military vassals, with their followers, it seemed a natural consequence, that he might, at pleasure, extend to the whole of his subjects that arbitrary system of law, which was held suitable to men living in camps. In that period of the English history, when family feuds and civil wars were frequent and universal, this extension might often prove salutary, as the means of quelling and preventing disorders. It was, at the same time, a measure from which great abuses might be expected; as it superseded, at once, that mild and equitable system of regulations, by which the rights and liberties of the nation were secured.

But the chief handle for the oppression of individuals, arose from the influence of the crown in the direction and conduct of public prosecutions. As every public prosecution proceeded in the name of the king, and was carried on by an officer whom he appointed during pleasure, he posessed, of course, a discretionary power in bringing the trial to an issue. Thus, by directing the prosecution of individuals for any atrocious crime, it was in the

power of the sovereign to deprive them of their liberty, and subject them to an indefinite imprisonment. Early attempts had been made to prevent this abuse of the prerogative; and in the great charter of king John, as well as in that of Henry the third, it is provided, that there shall be no unreasonable delay of justice.

This regulation was conceived in terms too vague and general, to be of much advantage; although its meaning and spirit are sufficiently obvious. Henry the seventh carried the abuse to such a height, as, upon pretence of crimes, to make a trade of imprisoning persons of great opulence, and of extorting from them sums of money as the price of their liberty. The names of Empson and Dudley, as the common agents of the crown in that infamous traffic, have been handed down to posterity; and it is remarkable that the house of commons, instead of discovering a resentment of such notorious oppression, made choice of Dudley for their speaker. The house of commons were at this period attached to the crown; and probably took little concern in the fate of the great barons, against whom, upon account of their opulence, and their opposition to the king, this

kind of extortion was most likely to be committed. But although these minions, for some time, escaped the vengeance due to their iniquitous practices, it overtook them in the beginning of the next reign; when, in consequence both of the sentence of a court, and of a bill of attainder in parliament, they were condemned to death and executed.

Upon the whole, it is a gross error to suppose, that the English government was rendered absolute in the reign of Henry the seventh. There is, on the contrary, no reason to believe, that any material variation was produced in the former constitution. Although the influence of the crown was increased, the prerogative remained upon its former basis. The king's authority was entirely subordinate to that of the national assembly; and if, in some cases, precautions had not been taken to prevent his arbitrary and oppressive measures, this was owing to the want of experience, which prevented the legislature from suggesting a remedy. Such abuses of prerogative, although they might have excited occasional discontent and clamour, had not yet attained so great magnitude, or been so long

continued, as to demonstrate that a general limitation was necessary.

The period of Henry the seventh in England, corresponded, in some measure, to that of Lewis the eleventh in France. Charles the seventh, the father of this prince, had recovered the kingdom from the English; and, after long convulsions and disorders, had re-established the public tranquillity. The nature of the struggle in which he was engaged, had excited a national spirit in favour of the crown, while the success of his undertaking rendered him highly popular, and disposed his subjects to promote and support all his measures. By the seizure of those lands which had been in the possession of the enemy, it is probable that the royal demesnes were also augmented. Lewis came to the throne at a time when these favourable circumstances had begun to operate, and by his abilities and political character was capable of improving them to the utmost. The sudden annexation of many great fiefs to the crown contributed likewise to extend its influence. Upon the decease of the duke of Burgundy, without male descendants, the monarch found himself in a

condition to seize that duchy, as not being transmissible to females. He acquired Provence by a legacy; and, in a little time after, his son Charles the Long, by marrying the heiress of Brittany, became the master of that territory.

The authority of the sovereign, however, which had formerly been advancing with greater rapidity in France than in England, became now much more absolute and unlimited. Lewis the eleventh new-modelled, and afterwards laid aside, the convention of estates, having united in his own person the legislative and executive powers. The same line of conduct was in general pursued by his successors; although, in one or two extraordinary cases, the temporary exigence of the prince might induce him to summon that ancient assembly. In several other governments upon the continent, we may also observe, that, nearly about the same period, the circumstances of the monarch were such as produced a similar exaltation of the prerogative.

CHAPTER X.

Of Henry the Eighth.—The Reformation.—Its Causes.—The Effects of it upon the Influence of the Crown.

HENRY the eighth reaped the full benefit of those favourable circumstances which began to operate, and of that uniform policy which had been exerted, in the reign of his father. By uniting, at the same time, in the right of his father and mother, the titles of the two houses of York and Lancaster, he put an end to the remains of that political animosity which had so long divided the nation, and was universally acknowledged by his subjects as the lawful heir of the kingdom. The personal character of this monarch was better suited to the possession and enjoyment of power, than to the employment of the slow and gradual means by which it is to be acquired. Vain, arrogant, headstrong, and inflexible, he shewed little dexterity in the management of his affairs; was unable to brook opposition or con-

troul; and, instead of shunning every appearance of usurpation, was rather solicitous to let slip no opportunity for the display of his authority.

The most remarkable event, in the reign of Henry the eighth, was the sudden downfal of that great system of ecclesiastical tyranny, which, during the course of many centuries, the policy of the Roman pontiff had been continually extending. To this religious reformation, the minds of men, in other European countries as well as in England, were predisposed and excited by the changes which had lately occurred in the general state of society.

1. The christian religion, by teaching mankind to believe in the unity of the Deity, presented to their minds the contemplation of the astonishing attributes displayed in the government of the universe. While the professors of christianity thus agreed in the main article of their belief, their disposition to speculate upon other points was promoted by their differences of opinion, by the controversies with one another in which they were unavoidably engaged, and by the variety of sects into which they were at length divided. The church, however, as-

sumed the power of determining the orthodox faith; and by degrees availed herself of the prevailing superstition, in order to propagate such opinions as were most subservient to her interest. Hence the doctrines relating to purgatory, to the imposition of penances, to auricular confession, to the power of granting a remission of sins, or a dispensation from particular observances, with such other tenets and practices as contributed to increase the influence of the clergy, were introduced and established. Not contented with requiring an implicit belief in those particular opinions, the church proceeded so far as to exclude entirely the exercise of private judgment in matters of religion; and, in order to prevent all dispute or inquiry upon that subject, even denied to the people the perusal of the sacred scriptures, which had been intended to direct the faith and manners of christians. A system of such unnatural restraint, which nothing but extreme ignorance and superstition could have supported, it was to be expected that the first advances of literature would be sufficient to overturn. Upon the revival of letters, accordingly, in the fourteenth and fifteenth centuries, it was no longer pos-

sible to prevent mankind from indulging their natural propensity in the pursuit of knowledge, and from examining those fundamental tenets of christianity which had been so anxiously withheld from their view. They were even prompted, so much the more, to pry into the mysteries of religion, because it was prohibited. To discover the absurdity of many of those doctrines, to which an implicit assent had been required, was not difficult. But the mere examination of them was to reject the decrees of the church, and to merit the censure of contumacy.

2. While the advancement of knowledge disposed men to exert their own judgment in matters of religion, the progress of arts, and of luxury, contributed to diminish the personal influence of the clergy. "In the produce of "arts, manufactures, and commerce," says the ingenious and profound author of the Inquiry into the Nature and Causes of the Wealth of Nations*, "the clergy, like the great barons,

* I am happy to acknowledge the obligations I feel myself under to this illustrious philosopher, by having, at an early period of life, had the benefit of hearing his lectures on the History of Civil Society, and of enjoying his unreserved conversation on the same subject.—The great Mon-

" found something for which they could ex-
" change their rude produce, and thereby dis-
" covered the means of spending their whole
" revenue upon their own persons, without
" giving any considerable share of them to
" other people. Their charity became gra-
" dually less extensive, their hospitality less
" liberal, or less profuse. Their retainers be-
" came consequently less numerous, and by
" degrees dwindled away altogether. The
" clergy, too, like the great barons, wished to
" get a better rent from their landed estates,
" in order to spend it in the same manner,
" upon the gratification of their own private
" vanity and folly. But this increase of rent
" could be got only by granting leases to their
" tenants, who thereby became, in a great
" measure, independent of them. The ties
" of interest, which bound the inferior ranks
" of people to the clergy, were, in this man-
" ner, gradually broken and dissolved.—The
" inferior ranks of people no longer looked
" upon that order, as they had done before, as
" the comforters of their distress, and the re-

tesquieu pointed out the road. He was the Lord Bacon in this branch of philosophy. Dr. Smith is the Newton.

" lievers of their indigence. On the contrary, " they were provoked and disgusted by the " vanity, luxury, and expence of the richer " clergy, who appeared to spend upon their " own pleasures what had always before been " regarded as the patrimony of the poor."

3. The improvement of arts, which obliged the dignified clergy, as well as the great barons, to dismiss their retainers, enabled this inferior class of men to procure subsistence in a different manner, by the exercise of particular trades and professions. By this way of life, they were placed in a condition which rendered them less dependent upon their superiors; and by which they were disposed to resist every species of tyranny, whether ecclesiastical or civil. That spirit of liberty, however, which, from these circumstances, was gradually infused into the great body of the people, began sooner to appear in opposing the usurpations of the church, than in restraining the encroachments of the king's prerogative. In pulling down the fabric of ecclesiastical power, and in stripping the clergy of their wealth, all who had any prospect of sharing in the spoil might be expected to give their concurrence. But in

limiting the power of the crown, the efforts of the people were counteracted by the whole weight of the civil authority. Thus, in England, the reformation was introduced more than a century before the commencement of the struggle between Charles the first and his parliament; although the same principle which produced the latter of these events, was evidently the chief cause of the former.

But whence has it happened, that the circumstances above-mentioned have operated more effectually in some parts of Europe than in others? What has enabled the pope to retain in obedience one half of his dominions, while the other has rejected his authority? That this was owing, in some measure, to accident, it seems impossible to deny. The existence of such a person as Luther in Germany, the dispute that arose in England between Henry the eighth and his wife, the policy of particular princes, which led them to promote or to oppose the interest of his holiness; these, and other such casual occurrences, during the course of this great religious controversy, had undoubtedly a considerable influence in determining its fate. We may take notice, how-

ever, of certain fixed causes, which contributed more to the progress of the reformation in some of the European countries than in others.

1. The Roman pontiff found it easier to maintain his authority in the neighbourhood of his capital than in countries at a greater distance. The superstition of the people was not, indeed, greater in the neighbourhood of Rome than in the distant parts of Europe. The contrary is well known to have been the case. But Rome was the centre of ecclesiastical preferment, and the residence, as well as the occasional resort, of great numbers of the most opulent churchmen, whose influence over the people was proportionably extensive. Here the pope was a temporal, as well as an ecclesiastical sovereign; and could employ the arm of flesh, as well as the arm of the spirit. Besides, he had here a better opportunity, than in remoter countries, of observing and managing the dispositions and humours of the inhabitants; and, being at hand to discover the seeds of any disorder, was enabled to crush a rebellion in the bud. This circumstance tended to prevent, or to check, the reformation in

Italy, or in France, more than in Sweden, in Denmark, in Germany, in England, or in Scotland.

2. Independent of accidental circumstances, it was to be expected that those countries, which made the quickest progress in trade and manufactures, would be the first to dispute and reject the papal authority. The improvement of arts, and the consequent diffusion of knowledge, contributed, on the one hand, to dispel the mist of superstition, and, on the other, to place the bulk of a people in situations which inspired them with sentiments of liberty. That principle, in short, which is to be regarded as the general cause of the reformation, produced the most powerful effects in those countries where it existed the soonest, and met with the greatest encouragement.

This alone will account for the banishment of the Romish religion from the independent towns of Germany, from the Dutch provinces, and from England; those parts of Europe which were soon possessed of an extensive commerce. In the ten provinces of the Netherlands, the advancement of trade and manufactures was productive of similar effects. The

inhabitants acquired an attachment to the doctrines of the reformation; and maintained them with a degree of courage and firmness which nothing less than the whole power of the Spanish monarchy was able to subdue. In France too the same spirit became early conspicuous, in that part of the inhabitants which had made the greatest improvement in arts; and, had it not been for the most vigorous efforts of the crown, accompanied with the most infamous perfidy and barbarity, and assisted by the celebrated league of the Catholic powers, it is probable that Calvinism would have obtained the dominion of the Gallican church. The tendency of mercantile improvements to introduce an abhorrence of the Catholic superstition, and of papal domination, is thus equally illustrated from the history of those kingdoms where the reformation prevailed, as of those where, by the concurrence of casual events, it was obstructed and counteracted.

3. In those countries where the smallness of a state had given rise to a republican constitution, the same notions of liberty were easily extended from civil to ecclesiastical government. The people, in those governments, were

not only disposed to reject the authority of the pope, as they did that of a temporal sovereign; but were even disgusted with the hierarchy, no less than with that subordination which is required in a monarchy. Hence that high-toned species of reformation, which began in Geneva, and in some of the Swiss cantons; and which, from the weakness and imprudent opposition of the crown, was introduced by the populace into Scotland.

The small states of Italy, indeed, although they fell under a republican government, and some of them were distinguished by their early advancement in commerce, have remained in the Catholic church. In some of the cantons of Switzerland, notwithstanding their very limited extent, and their popular government, the reformation has likewise been unsuccessful. The vicinity of the pope's residence, and of his temporal dominions, appear, in spite of the circumstances which had so plainly an opposite tendency, to have retained them under his jurisdiction. It may deserve, however, to be remarked, that the Venetians, the principal traders of Italy, and who formed the most eminent republic, though they did not establish

the doctrines of any sect of the reformers, effected what is perhaps more difficult, and had more the appearance of moderation: they diminished the authority of the pope, without rejecting it altogether; and, though they did not attempt to root out the ancient system, they lopped off such parts of it as they deemed inconsistent with their civil constitution.

After the controversy between the Catholics and Protestants had proceeded so far, in England, as to divide the whole nation, Henry the eighth became possessed of additional influence, by holding a sort of balance between the two parties. Although that prince had quarrelled with the papal authority, and was willing to enrich himself by the plunder of the church, he adhered religiously to many of those tenets which had given the greatest offence to the reformers. While he took the lead in the reformation, he assumed the power of directing and controuling its progress; and, as he still kept measures with both parties, he was at the same time feared and courted by both. In the end, however, he established a system which was agreeable to neither.

The reformation, as it was modelled in this reign, opened a new source of influence and authority to the sovereign. The dissolution of the monasteries, whose revenues were immediately annexed to the crown, bestowed upon him a large accession of riches. These funds, indeed, in consequence of the improvements in trade and manufactures, which tended to augment the expences of the king, as well as of the great barons, were afterwards dissipated, and, in the end, transferred to that lower order of people, who, by their industry, were enabled to accumulate wealth.

As the pope was stripped of all that authority which he had possessed in England, the king became the head of the church; and as the English hierarchy was, without any variation, permitted to remain, he acquired, by the disposal of all the higher benefices, the entire direction of the clergy, and consequently the command of that influence which they still maintained over the people. By claiming, at the same time, the supremacy of the Roman pontiff, the sovereign was furnished with a new pretext for assuming the power to dispense with the law.

But, notwithstanding all the circumstances which contributed to extend the influence of the crown, the prerogative, during the greatest part of this king's reign, appears to have remained upon the same footing as in that of his predecessor. Through the whole of it, the power of imposing taxes was uniformly exercised by parliament. Upon one occasion a loan was demanded by the king; but so little money was raised by it, that an immediate application to parliament became necessary for procuring a subsidy.

Cardinal Wolsey, in the plenitude of his power, seems to have projected an encroachment upon this branch of the constitution. He began by interfering in the debates of the commons, in relation to a money-bill, and insisted upon the liberty of reasoning with them upon the subject. But this demand was peremptorily refused; and he was unable to procure the supply, in the terms which he had proposed. Not long after, he attempted to levy a *tax* by the authority of the crown; but this measure excited such universal commotion, and resentment, that Henry thought fit

to disavow the whole proceeding, and sent letters all over England, declaring, *that he would ask nothing but by way of benevolence**.

From this time no money was levied by the king without the consent of parliament; except in the thirty-fifth year of his reign, when a benevolence was again solicited. It is further to be observed, that the parliamentary grants of supply to the king, were sometimes preceded by an inquiry into the propriety of the wars which he had undertaken, or of the other measures of government by which his demand of money had been occasioned.

The legislative authority of the national council was no less regularly exerted. It was by act of parliament that the monasteries were suppressed; that the king became the head of the church; that the authority of the pope in England, together with all the revenues which he drew from that kingdom, was abolished; in short, that the ancient system of ecclesiastical government was overturned. In the numerous divorces procured by the sovereign, in

* This attempt was made in the year 1526, and the 17th of this king. See Parl. History, vol. III.

the regulations that were made concerning the legitimacy of the children by his different wives, in the various and contradictory settlements of the crown, Henry never pretended to act by virtue of his own prerogative, but continually sheltered himself under the sanction of parliamentary establishment.

Nothing, indeed, could exceed the servility with which the parliaments, especially in the latter part of this reign, complied with the most eccentric inclinations of the monarch. Pleased with the general tendency of his measures, by which the nation was delivered from the yoke of papal dominion, they seem to have resolved not to quarrel with his ridiculous humours, nor even with particular acts of tyranny and oppression. In a dangerous distemper, they were unwilling to reject a violent medicine, on account of the uneasiness and trouble with which its operation was attended. Their complaisance, however, was at length carried so far as to make them abandon their own privileges. In the thirty-first year of Henry the eighth, it was enacted, "That the king, with "the advice of his council, might issue pro-

"clamations, under such penalties as he should "think necessary, and that these should be "observed, as though they were made by act "of parliament," with this limitation, "that "they should not be prejudicial to any per- "son's inheritance, offices, liberties, goods, "chattels, or life*." What are the particular subjects of proclamation, which do not fall within the restrictions mentioned in this act, is not very clear. But there can be no doubt that it contains a delegation, from parliament, of its legislative authority; which, in practice, might soon have been extended beyond the original purpose for which it was granted. By another statute, about the same time, the king was empowered, with the assistance of a committee, or even by his own authority alone, to regulate the religious tenets, as well as the external observances, of the kingdom.

If these powers had been ascertained, and confirmed by usage, the government of England would have become as absolute as that of France was rendered by Lewis the eleventh.

* 31 Henry VIII. ch. 8.

Fortunately, the English monarch, from the obsequiousness of parliament, had little occasion to exercise this new branch of prerogative; and, as he did not live to reduce it into a system, the constitution, in the reign of his successor, returned into its former channel. The last years of Henry the eighth exhibited the greatest elevation, which the crown ever attained, under the princes of the Tudor family.

CHAPTER XI.

Of Edward the Sixth—Mary—and Elizabeth.—General Review of the Government.—Conclusion of the Period from the Norman Conquest to the Accession of the House of Stewart.

BY the minority of Edward the sixth, the ambitious designs of his father became entirely abortive. The administration was committed to a council of the nobles; who, from want of authority, from disagreement among themselves, or from the desire of popularity, were induced to retrench all the late extensions of the prerogative. The very first year of this reign produced a repeal of that offensive statute, by which royal proclamations had, in any case, obtained the force of laws. Other innovations, which had proceeded from the extraordinary influence of Henry the eighth, were likewise abolished; and, in a short time, the former constitution was completely restored. The reformation, although it continued the direction which had been

given to it by Henry the eighth, was carried, in this reign, to an extent, and acquired a form, somewhat more agreeable to the general sentiments of the party by whom it was embraced.

The reign of Mary is chiefly distinguished by the violent struggle which it produced, in order to re-establish the Roman catholic superstition. Although the reformation was, at this time, acceptable to the majority of the nation, there still remained a numerous body, zealously attached to the ancient religion, and highly exasperated by the late innovations. With this powerful support, and by the most vigorous exertion of crown-influence upon the elections of the commons, Mary was able to procure a parliament entirely devoted to her interest, and willing to execute her designs *. The restitution of the revenues, of which the monasteries had been plundered, and in which a great part of the nobility and gentry had been sharers, was the only measure at which they seemed to feel any scruple of conscience. But the reign of Mary, though it occasioned a violent shock to the reformation, was too short

* Burnet's History of the Reformation.

for extirpating those religious opinions, which had taken a deep root throughout the kingdom; and which, upon the accession of her successor, were prudently cultivated and brought to maturity.

In the English annals, we meet with no reign so uniformly splendid and fortunate as that of Elizabeth. Never did any sovereign, since the days of Alfred, enjoy such high and such deserved popularity, or procure such extensive advantages to the nation. To her the nation was indebted for the security of religious, the great forerunner of civil liberty. Her own religion coincided with that of the greater part of her subjects; who looked up to her as their deliverer from a superstition which they abhorred. Nor did she appear in this light to her own subjects only: she was the great support and protector of the protestant interest in Europe; and, while this drew upon her the enmity of all the Catholic powers, she was endeared to her own people by the reflection, that her zeal in defending them from the tyranny of Rome, was continually exposing her to machinations, which threatened to bereave her of her crown and of her life. Her magnanimity and

public spirit, her penetration and dexterity, her activity and vigour of mind, her undaunted resolution, and command of a temper naturally violent and impetuous, were equally conspicuous in her domestic and foreign transactions; and, in the whole course of her administration, it will be hard to point out an instance where she mistook her political interest, or was guilty of any error or neglect in promoting it. Notwithstanding the number and power of her enemies, and in spite of all the combinations that were formed against her, she maintained invariably the peace and tranquillity of her own dominions; and her subjects, during a reign of five and forty years, enjoyed a course of uninterrupted prosperity and happiness.

Whether Elizabeth entertained a just idea of the English constitution, has been called in question. But such as her idea was, her behaviour seems to have been strictly conformable to it. Between the prerogative, and the privileges of the parliament, she appears to have drawn a fixed line; and, as in her greatest prosperity she never exceeded this boundary, so

in the utmost distress and perplexity she never permitted the least encroachment upon it.

With the legislative power of parliament she never interfered. The exclusive privilege of that assembly, in imposing taxes, was neither controverted by her, nor impaired. There is no vestige of her either attempting, or desiring, to violate these important branches of parliamentary authority *. Mention is made of her having, in one or two cases, obtained a loan from her subjects: but there is no appearance that any compulsion was employed in making it effectual; and her conduct is, in this particular, illustriously distinguished from that of most other princes, by her punctual repayment of the money.

Instead of asking a benevolence, she even refused it, when offered by parliament. Such expedients, indeed, for procuring supplies, were in a great measure superfluous. So rigid was her œconomy, so great and so apparent were

* In the 13th of Elizabeth, we find parliament strongly asserting its power to settle and limit the succession to the crown, by declaring it high treason for any person to call this power in question.

the occasions upon which she ever demanded a supply, such was the confidence reposed in her by parliament, and so intimately did they conceive her enterprizes to be connected with the public welfare, that they never discovered any reluctance to grant whatever sums of money she thought proper to require.

There was one point invariably maintained by Elizabeth, in which, to those who form their notions of the English government from what is at present established, she appears to have been guilty of an encroachment. An act of parliament originally proceeded upon a petition to the sovereign for the redress of a grievance, or the removal of some inconvenience; and when this petition had obtained the king's consent, it acquired the force of a law. According to this method of conducting the business of legislation, the king had no occasion to declare his resolution concerning any bill, until it was discussed, and finally approved of, by both houses of parliament. Before this was done, it could not be considered as a national request, to which an answer from the throne was demanded.

From the nature of this transaction, and

from the view of saving trouble to the sovereign, a regular course of procedure was thus introduced, by which any new law received the assent of the crown, after the sanction of the other two branches of the legislature had been given to its enactment. This practice, deriving authority from custom, was at length followed independent of the circumstances from which it had been orginally suggested; and was confirmed by the experience of a later age, which discovered, that any deviation from it would be attended with dangerous consequences. When the proposal of a new law, after being fully debated in parliament, has excited the public attention, and its utility has become apparent to the nation, the crown is, in most cases unwilling to counteract the inclinations of the people, by refusing its consent to the measure. But if the sovereign were permitted to smother any bill, the moment it was proposed in parliament, there could scarcely exist a possibility, that any new law, disagreeable to the crown, or adverse to the views of a ministry, should ever be enacted. It has therefore become a fundamental principle of the constitution, that, with a few exceptions,

the king shall not take notice of any bill depending in parliament; and that, before it has passed the two houses, the royal assent or negative shall not be declared.

But that this rule was completely and invariably established in the reign of Elizabeth, there is no reason to believe. The political expediency of such a regulation was, in that age, not likely to become an object of general attention. Neither was it inconsistent with the nature of the business, however contrary to the usual practice, that the king, upon the introduction of a bill into parliament, should prevent the labour of a fruitless discussion by an immediate interposition of his negative *.

Of this interposition Elizabeth exhibited some remarkable instances. The first improvement of arts, manufactures, and commerce, by raising the lower class of the inhabitants to a better condition, disposed them to free themselves from the tyranny of the

* We find, however, that even so early as the second of Henry the fourth, the commons petitioned the king, that he would not suffer any report to be made to him of matters debated amongst them, till they should be concluded; to which the king assented.

great barons, and for that purpose to court the protection of the crown. But when this improvement was farther extended, the great body of the people became still more independent, and found themselves capable of defending their privileges, whether in opposition to the crown or to the nobles. This gave rise to a new spirit, which became conspicuous after the accession of James the first, but of which the dawn began to appear in the reign of his predecessor; a spirit of liberty in the commons, by which they were incited to regulate and to restrain such branches of the prerogative as appeared the most liable to abuse, and most inconsistent with the enjoyment of those rights which they were disposed to assert.

Whenever a bill of this tendency was brought into parliament; such as that for limiting the crown as head of the church, or for the diminution of its power in granting monopolies; the queen made no scruple to declare immediately her opposition to the measure, and even to prohibit any farther debate upon the subject. In doing this, she seems to have considered herself as merely defending those rights of the crown which had been

transmitted by her ancestors. Is not the sovereign, said the ministry in those cases, a branch of the legislature? Has she not a voice in the passing of laws? When her negative has once been interposed, all farther deliberation upon the subject must be entirely excluded; and the bill must be laid aside, in the same manner as if it had been rejected by either house of parliament.

This view of the prerogative suggested another exertion of authority, which, in the present age, has been thought still more illegal and arbitrary than the former. If, at any stage of a bill in parliament, the crown was entitled to interpose its negative, it seemed to be a consequence, that, upon the exercise of this right, any farther debate or deliberation upon the subject was precluded. The attempt to prosecute the bill, after such intimation was given upon the part of the crown, was to reject the determination of the legislature, to contemn the authority of the sovereign, and, by faction and clamour, to stir up disorder and discontent. A behaviour of this kind was thought liable to punishment; and Elizabeth, upon several occasions, adventured to imprison those members

of parliament who persisted in pushing forward those bills which had been refused by the crown.

It is proper to remark, that these exertions of her power we limited to cases of that nature. She never prevented the discussion of any bill in parliament, except in cases where her ancient prerogative was invaded; nor did she ever pretend to punish the liberty of speech, unless when indulged in continuing to push those bills which she had declared her final resolution to reject.

That such proceedings, however, by intimidating members of parliament, are calculated to prevent the proper discharge of their duty, is indisputable. The liberal ideas upon this point, which are now happily reduced into practice, may be regarded as one of the greatest improvements in the British constitution. That a senator may be encouraged to perform his duty to the public with steadiness and confidence, he ought to enjoy an unbounded liberty of speech, and to be guarded against the resentment either of the sovereign, or of any other persons in power, whom that liberty may offend. From the controul of that house, of

which he is a member, he is likely to be prevented from any great indecency and licentiousness in the exercise of this privilege; and his parliamentry conduct should not be impeached, or called in question, in any other court, or from any other quarter. This principle is now sufficiently understood, and universally acknowledged. Its establishment, however, marks a degree of refinement, and of experience in political speculation, which, under the government of the Tudor princes, the nation could hardly be supposed to attain; and the liberty of speech, then belonging to the members of parliament, was probably limited to subjects which that assembly had a right to discuss.

The situation of religious controversy, in the reign of Elizabeth, gave rise to a new ecclesiastical tribunal, which in after times, was likewise held inconsistent with free government, the *court of high commission*. It must be acknowledged, that the primitive reformers, in any country of Europe, though they zealously opposed the papal tyranny, were far from adopting the liberal principle of religious toleration. Such a principle would, perhaps, have

been unsuitable to their circumstances, which required that they should combat the most inveterate prejudices, and overturn a system, which for ages had been advancing in respect and authority. As, in England, the king succeeded to the supremacy, which had been vested in the Roman pontiff, he became the judge of orthodoxy in matters of religion; and assumed the power of directing the modes and forms of religious worship. This authority was, by Henry the eighth delegated to a single person, with the title of *Lord vicegerent.* In the reign of Elizabeth, parliament thinking it safer that such jurisdiction should be entrusted to a numerous meeting, empowered the queen to appoint a commission for the exercise of it*. This alteration was a manifest improvement; yet the court of high commission was so little fettered by the rules of law, and was so much calculated to indulge the rancour and animosity inspired by theological disputes, that we may easily suppose the complaints, which it excited, were not without foundation. Its abolition, in a subsequent reign, was farther recommended

* Burnet, Hist. Reform.

from this consideration, that, after the full establishment of the reformation, the same necessity of inculcating uniformity of religious tenets could no longer be pretended.

The great historian of England, to whom the reader is indebted for the complete union of history with philosophy, appears very strongly impressed with a notion of the despotical government in the reign of Elizabeth, and of the arbitrary and tyrannical conduct displayed by that princess.

He observes, that "she suspended the "laws, so far as to order a great part of the "service, the litany, the Lord's prayer, the "creed, and the gospels, to be read in English: "And, having first published injunctions, that "all the churches should conform themselves to the practice of her own chapel, she "forbade the hoste to be any more elevated "in her presence; an innovation, which, however frivolous it may appear, implied the "most material consequences."

But we must not forget, that, in this case, the dispensing power was exercised under great limitations, and in very singular circumstances. Upon the accession of Elizabeth, the Protes-

tants, who now formed the greatest part of her subjects, exasperated by the late persecution, and in full confidence of protection, began to make violent changes; to revive the service authorized by Edward the sixth, to pull down images, and to affront the priests of the Roman catholic persuasion. The queen had called a parliament to settle the national religion; but, in order to stop the progress of these disorders, an immediate interposition of the crown was necessary. It was even pretended by some, that the parliaments, in the late reign, had not been legally held, and that of consequence the laws of Edward the sixth, relating to the government of the church, were still in force*. But, whatever regard might be due to this, a temporary indulgence to the protestants, with respect to the external forms of religious worship, was highly expedient for quieting their minds, and for preventing the commission of greater enormities. This indulgence was followed by a proclamation prohibiting all innovations, until the matters in dispute should be finally determined by

* Burnet.

parliament; and, considering the circumstances of the case, ought to be regarded rather as a measure calculated for the present security of the established religion and its professors, than as a violent exertion of the prerogative, in opposition to the laws of the land.

2. But this author, not contented with ascribing to the crown a power of suspending the laws, has gone so far as to assert, that it was entitled, at pleasure, to introduce new statutes. "In reality," says he, "the crown "possessed the full legislative power, by means "of proclamations, which might affect any "matter, even of the greatest importance, and "which the star-chamber took care to see "more rigorously executed than the laws "themselves*."

In answer to this, it will perhaps be thought sufficient to observe, that anciently the crown possessed no legislative power; that royal proclamations were first declared to have the force of laws, in the latter part of the reign of Henry the eighth; that even then, this force was given them under great restric-

* Hist. of Eng. vol. V. Appendix 3.

tions, and in singular cases; and that in the beginning of the subsequent reign, it was entirely abolished by the same authority from which it had proceeded.

If the star-chamber, therefore, supported this power in the reign of Elizabeth, it must have been in direct violation of the constitution; and it is not likely, that stretches of this kind would often be attempted. But let us consider what were the proclamations issued in this reign, which the star-chamber had an opportunity to enforce. In virtue of the papal supremacy, with which she was invested, Elizabeth prohibited *prophecyings* or particular assemblies instituted for fanatical purposes, and not authorized by the church*. Having the regulation of trade and manufactures, she also

* In the fifth of Elizabeth there was passed an act, conformable to a preceding one in the reign of Edward the sixth, against *fond and fantastical prophecies concerning the queen and divers honourable persons*, which, it seems, had a tendency to stir up sedition. From the name, it is not unlikely that the assemblies, alluded to in the proclamation above-mentioned, were supposed guilty of the like practices, and that Elizabeth was merely following out the intention of an act of parliament.

prohibited the culture of *woad*, a plant used for the purpose of dying. And, as a director of ceremonies, prescribing rules for the dress of those who appeared at court, or in public places, she gave orders that the length of the swords, and the height of the ruffs then in fashion, should be diminished. These are the important instances adduced in order to prove that Elizabeth superseded the authority of acts of parliament, and assumed the legislative power in her own person.

3. The same historian appears to conceive, that, among other branches of prerogative exercised by Elizabeth, was that of imposing taxes. "There was," he remarks, "a species "of *ship-money* imposed at the time of the "Spanish invasion: the several ports were "required to equip a certain number of ves-"sels at their own charge; and such was the "alacrity of the people for the public defence, "that some of the ports, particularly Lon-"don, sent double the number demanded of "them*." And in a subsequent period of the English history, having mentioned a requisition

* Vol. V. Appendix 3.

made by Charles the first, that the maritime towns, *together with the adjacent counties*, should arm a certain number of vessels, he adds; "This "is the first appearance, in Charles's reign, of "ship-money; a taxation which had once been "imposed by Elizabeth, but which afterwards, "when carried some steps farther by Charles, "occasioned such violent discontents*."

Ship-money was originally a contribution by the maritime towns, for the support of the fleet, corresponding, in some measure, to the scutages which were paid by the military people in room of personal service in the field. When it came, therefore, to be a regular assessment, exacted by public authority, it fell of course under the regulation of parliament; and, like other taxes, being gradually pushed beyond its original boundaries, was extended to the counties in the neighbourhood of the sea, and at length to the most inland parts of the kingdom. To oppose an invasion which threatened the immediate destruction of her empire, Elizabeth had recourse to the customary assistance of the sea-port towns; and, so

far from using compulsion to procure it, was freely supplied with a much greater force than she required. How can this measure be considered as analogous to the conduct of Charles the first, in levying that *ship-money*, which gave rise to such violent complaints? The contribution obtained by Elizabeth was altogether voluntary: that which was levied by Charles was keenly disputed by the people, and enforced by the whole power of the crown. The supply granted to Elizabeth was furnished by the maritime towns only; who, by their employment and situation, were connected with the equipment of vessels: that which was extorted by Charles, had been converted into a regular tax; and was imposed upon the nation at large. The ship-money of Elizabeth was procured in a single case, and one of such extraordinary necessity, as would have excused a deviation from the common rules of government. But the ship-money of Charles was not palliated by any pretence of necessity: it was introduced, and, notwithstanding the clamours of the people, continued for a considerable period, with the avowed intention of enabling the king to rule without a parliament.

4. But the chief ground of this opinion, concerning the tyrannical behaviour of Elizabeth, and the despotical nature of her government, appears to be her interference in the debates of parliament; her imprisonment of members for presuming to urge the prosecution of bills, after she had put a negative upon them; and the tameness with which parliament submitted to those exertions of prerogative.

It must be confessed, that if, in the present age, a British monarch should act in the same manner, and should meet with the same acquiescence from parliament, we might reasonably conclude that our freedom was entirely destroyed. But the submission of that assembly, at a period when the order, in which the king's negative should be interposed, was not invariably determined, does not argue the same corruption; and therefore will not warrant the same conclusion. Whatever might be the view entertained by some members of parliament in that age, the greater part of them were probably not aware of the consequences with which those exertions of the crown might be attended; and as, with reason, they placed

great confidence in the queen's intentions, their jealousy was not roused by a measure which did not seem to violate any fixed rule of the government.

Neither have we any good reason to infer, that, because this point had hitherto been left undetermined, the constitution was of no value or efficacy to maintain the rights of the people. It was, no doubt, a great defect in the political system, that the king might put a stop to any bill depending in parliament, and prevent any further debate with relation to it. But even this power of the sovereign was far from rendering the government despotical. By means of it, he might the more effectually defend his own prerogative, but it could not enable him to encroach upon the liberty of the subject. The parliament, without whose authority no innovation could be made, was the less capable of introducing any new regulation; but not the less qualified to maintain the government as it stood. The power of taxation, at the same time, threw a prodigious weight into the scale of parliamentary influence. By the increasing expence of government, a consequence of the improvement of arts, and the

advancement of luxury, the old revenues of the crown became daily more inadequate to the demands of the sovereign; which laid him under the necessity of making frequent applications to parliament for extraordinary supplies. This, as it reduced him to a dependence upon that assembly, enabled it to take advantage of his necessities, and to extort from him such concessions as experience had shown to be requisite for securing the rights and privileges of the people.

15. According to Mr. Hume, "the government of England, during that age, however "different in other particulars, bore, in this "respect, some resemblance to that of Turkey "at present: the sovereign possessed every "power, except that of imposing taxes: and "in both countries this limitation, unsupported by other privileges, appears rather prejudicial to the people. In Turkey, it obliges "the Sultan to permit the extortion of the "bashaws and governors of provinces, from "whom he afterwards squeezes presents, or "takes forfeitures. In England, it engaged "the queen to erect monopolies, and grant "patents for exclusive trade: an invention

"so pernicious, that had she gone on during "a tract of years, at her own rate, England, "the seat of riches and arts, and com- "merce, would have contained, at present, "as little industry as Morocco, or the coast "of Barbary*."

But surely, in England, the sovereign was not possessed of every power, except that of imposing taxes. The power of legislation was vested in the king, lords, and commons. The judicial power was not, in ordinary cases, exercised by the crown, but was distributed among various courts of justice; and though, in these, the judges, from the manner of their appointment, might be supposed to favour the prerogative, yet the modes of their procedure, and the general rules of law, were in most cases too invariably determined, to permit very gross partiality. The institution of *juries*, besides, which had long been completely established in England, was calculated to counterbalance this natural bias of judges, and to secure the rights of the people. Is it possible that, in such a government, the power

* History of England, vol. V. Appendix 3.

of the monarch can be seriously compared to that which prevails in Turkey?

The sovereign, indeed, was entitled to erect monopolies, and to grant exclusive privileges; which, in that period, were thought necessary for the encouragement of trade and manufactures. That these grants were often bestowed for the purpose merely of deriving a pecuniary advantage to the crown, it is impossible to deny. But who can believe that the perquisites, arising from this branch of the prerogative, or from such of the feudal incidents as were still of an arbitrary nature, were ever likely to defray the extraordinary expences of the crown, and to supersede the necessity of soliciting taxes from parliament?

The star-chamber, and the court of high commission, were doubtless arbitrary and oppressive tribunals; and were in a great measure under the direction of the sovereign. But their interposition, though justly the jubject of complaint, was limited to singular and peculiar cases; and, had it been pushed so far as to give great interruption to the known and established course of justice, it would have occasioned such odium and clamour, as no

prince of common understanding would be willing to incur.

To be satisfied, upon the whole, that the English constitution, at this period, contained the essential principles of liberty, we need only attend to its operation, when the question was brought to a trial, in the reigns of the two succeeding princes. At the commencement of the disputes between the house of commons and the two first princes of the Stewart family, the government stood precisely upon the same foundation as in the time of Elizabeth. Neither the powers of parliament had been increased, nor those of the sovereign diminished. Yet, in the course of that struggle, it soon became evident, that parliament, without going beyond its undisputed privileges, was possessed of sufficient authority, not only to resist the encroachments of prerogative, but even to explain and define its extent, and to establish a more compleat and regular system of liberty. It was merely by withholding supplies, that the parliament was able to introduce these important and salutary regulations. Is the power of taxation, therefore, to be considered as prejudicial to

the people? Ought it not rather to be regarded as the foundation of all their privileges, and the great mean of establishing that happy mixture of monarchy and democracy which we at present enjoy?

Conclusion of the Period, from the Norman Conquest.

WHEN we review the English constitution, under the princes of the Norman, the Plantagenet, and the Tudor line, it appears to illustrate the natural progress of that policy which obtained in the western part of Europe, with such peculiar modifications, as might be expected, in Britain, from the situation of the country, and from the character and manners of the inhabitants. By the completion of the feudal system, at the Norman conquest, the authority of the sovereign was considerably increased; at the same time that his powers, in conformity to the practice of every rude kingdom, were, in many respects, discretionary and uncertain. The subsequent progress of government produced a gradual exaltation of the

crown; but the long continued struggle between the king and his barons, and the several great charters which they extorted from him, contributed to ascertain and define the extent of his prerogative. While the monarchy was thus gaining ground upon the ancient aristocracy, the constitution was acquiring something of a regular form, and, by the multiplication of fixed laws, provision was made against the future exertions of arbitrary power.

By the insular situation of Britain, the English were little exposed to any foreign invasion, except from the Scots, whose attacks were seldom very formidable; and hence the king, being prevented from engaging in extensive national enterprizes, was deprived of those numerous opportunities for signalizing his military talents, and for securing the admiration and attachment of his subjects, which were enjoyed by the princes upon the neighbouring continent. Thus the government of England, though it proceeded in a similar course to that of the other monarchies in Europe, became less absolute than the greater part of them;

and gave admittance to many peculiar institutions in favour of liberty.

The same insular situation, together with the climate and natural produce of the country, by encouraging trade and manufactures, gave an early consequence to the lower order of the inhabitants; and, by uniting their interest with that of the king, in opposing the great barons, disposed him to increase their weight and importance in the community. Upon this account, when the crown had attained its greatest elevation, under the princes of the Tudor family, the privileges of the commons were not regarded as hostile to the sovereign, but were cherished and supported as the means of extending his authority.

In consequence of these peculiar circumstances, the government of England, before the accession of James the first, had come to be distinguished from that of every other kingdom in Europe: the prerogative was more limited; the national assembly was constituted upon a more popular plan, and possessed more extensive powers; and, by the intervention of juries, the administration of justice, in a man-

ner consistent with the rights of the people, was better secured.

These peculiarities, it is natural to suppose, could hardly escape the attention of any person, even in that period, who had employed himself in writing upon the government of his country. And yet the historian, whom I formerly quoted, imagines that, before the reign of James the first, the English had never discovered any difference between their own constitution and that of Spain or France; and declares "that he has "not met with any writer in that age, who "speaks of England as a limited monarchy, "but as an absolute one; where the people "have many privileges*." This appears the more extraordinary, as foreigners, he acknowledges, were sufficiently sensible of the distinction. "Philip de Comines re-"marked the English constitution to be "more popular, in his time, than that of "France. And Cardinal Bentivoglio men-"tions the English government as similar to "that of the Low Countries under their

* See note Q_2 at the end of vol. VI.

"princes, rather than to that of France or "Spain*."

To prove that English authors did not conceive their government to be a limited monarchy, it is farther observed, that Sir Walter Raleigh, a writer suspected of leaning towards the puritanical party, divides monarchies into such as are *entire*, and such as are *limited* or *restrained;* and that he classes the English government among the former. It must be observed, however, that by a limited monarchy, in this passage, is meant that in which the king has not the sovereignty in time of peace, as in Poland. This is the explanation which the author himself gives of his doctrine.

But not to insist upon the expressions of Sir Walter Raleigh, a courtier, who thought it incumbent upon him to write of queen Elizabeth in a style of romantic love; an adventurer, continually engaged in projects which required the countenance and support of the prince; I shall mention two English writers, whose authority upon this point will perhaps be thought superior, and whose opinion is much more direct and explicit.

* See note Q, at the end of vol. VI.

The first is Sir John Fortescue, the lord chief justice, and afterwards the chancellor to Henry the sixth, who has written a treatise upon the excellence of the English laws, and who, from his profession, as well as from the distinguished offices which he held by the appointment of the sovereign, will not readily be suspected of prejudices against the prerogative*. This author, instead of conceiving the English government to be an absolute monarchy, describes it in language that seems, in every respect, suitable to the state of our present constitution. After distinguishing governments into *regal* and *political*, that is, into absolute and limited, he is at pains, through the whole of his work, to inculcate, that the English government is of the latter kind, in opposition to the former. "The second point, "most worthy prince, whereof you stand in

* This book was translated into English, and published in the reign of Elizabeth, by Robert Mulcaster, a student of law, and dedicated to one of her justices of the Common Pleas. From the dedication, it should seem that the doctrines contained in this publication, were not understood to be, in any degree, offensive to administration, or contrary to the ideas, of the English constitution, entertained by the lawyers of that reign.

" fear," (I make use of the old translation, to avoid the possibility of straining the expression) " shall in like manner, and as easily as the " other, be confuted. For you stand in doubt " whether it be better for you to give your " mind to the study of the laws of England, " or of the civil laws; because they, through- " out the whole world, are advanced in glory " and renown above all men's laws. Let not " this scruple of mind trouble you, O most " noble prince: for the king of England can- " not alter nor change the laws of his realm, " at his pleasure. For why, he governeth his " people by power, not only *regal* but *political*. " If his power over them were regal only, " then he might change the laws of his realm, " and charge his subjects with tallage and " other burdens without their consent*."—

* " Secundum vero, princeps, quod tu formidas, consi- " mili nec majori opera elidetur. Dubitas nempe, an " Anglorum legum, vel civilium studio te conferas, dum " civiles supra humanas cunctas leges alias, fama per orbem " extollat gloriosa. Non te conturbet, fili regis, hæ mentis " evagatio: nam non potest rex Angliæ ad libitum suum, " leges mutare regni sui. Principatu namque, nedum *regali*, " sed et *politico*, ipse suo populo dominatur. Si *regali* tantum " ipse præesset iis, leges regni sui mutare ille posset, *talla-*

The aim of a limited monarchy he afterwards explains more fully. "Now you understand," says he, "most noble prince, the form of institution of a kingdom *political*; whereby you may measure the power, which the king thereof may exercise over the law, and subjects of the same. For such a king is made and ordained for the defence of the law of his subjects, and of their bodies, and goods, whereunto he receiveth power of his people, so that he cannot govern his people by any other power*."—Then follows a more particular application of this doctrine to the constitution of England. "Now whether the statutes of England be good or not, that only remaineth to be discussed. For they proceed not only from the prince's pleasure, as do the laws of those kingdoms

"*gium* quoque at cætera onera eis imponere ipsis inconsultis."—*Fortescue, de Laudibus Legum Angliæ*, c. 9.

* "Habes in hoc jam, princeps, *instituti* omnis *politici* regni formam, ex qua metire poteris potestatem quam rex ejus in leges ipsius, aut subditos valeat exercere. Ad tutelam namque legis subditorum, ac eorum corporum, et bonorum, rex hujusmodi erectus est; et ad hanc potestatem a populo effluxam ipse habet, quo ei non licet potestate alia suo populo dominari."—Cap. 13.

"that are ruled only by *regal* government, "where sometimes the statutes do so procure "the singular commodity of the maker, that "they redound to the hinderance and damage "of his subjects.—But statutes cannot thus "pass in England, for so much as they are "made, not only by the prince's pleasure, but "also by the assent of the whole realm: so "that of necessity they must procure the "wealth of the people, and in no wise tend "to their hinderance*."—After stating some objections, in the name of the prince, he goes on: "Do you not now see, most noble prince, "that the more you object against the laws of "England, the more worthy they appear?—I "see plainly, quoth the prince, that in the "case wherein you have now travailed, they "have the pre-eminence above all other laws

* "Statuta tunc Anglorum, bona sint necne, solum restat "explorandum. Non enim emanant illa a principis solum "voluntate, ut leges in regnis quæ tantum *regaliter* guber-"nantur, ubi quandoque statuta ita constitutentis procurant "commodum singulare, quod in ejus subditorum ipsa re-"dundant dispendium.—Sed non sic Angliæ statuta oriri "possunt, dum *nedum principis voluntate, sed et totius regni* "*assensu*, ipsa conduntur, quo populi læsuram illa efficere "nequeunt, vel non eorum commodum procurare."—Cap. 18.

" of the world; yet we have heard that some
" of my progenitors, kings of England, have
" not been pleased with their own laws, and
" have therefore gone about to bring in the
" civil laws to the government of England,
" and to abolish their own country laws. For
" what purpose and intent they so did I much
" marvel.—You would nothing marvel there-
" at, quoth the chancellor, if you did deeply
" consider with yourself the cause of this in-
" tent. For you have heard before, how that
" among the civil laws, that maxim or rule is
" a sentence most notable, which thus singeth,
" *The prince's pleasure standeth in force of a law*;
" quite contrary to the decrees of the laws of
" England, whereby the king thereof ruleth
" his people, not only by *regal* but also by *po-*
" *litical* government; insomuch that, at the
" time of his coronation, he is bound by an
" oath to the observance of his own law:
" which thing some king's of England, not
" well brooking, as thinking that thereby they
" should not freely govern their subjects as
" other kings do, whose rule is only regal,
" governing their people by the civil law,
" and chiefly by that foresaid maxim of the

" same law, whereby they, at their pleasure,
" change laws, make new laws, execute pu-
" nishments, burden their subjects with char-
" ges; and also, when they list, do determine
" controversies of suitors, as pleaseth them.
" Wherefore these your progenitors went
" about to cast off the yoke *political*, that they
" also might rule, or rather rage over the
" people their subjects in *regal* wise only: not
" considering that the power of both kings is
" equal, as in the foresaid treatise of the law
" of nature is declared; and that to rule the
" people by government *political* is no yoke;
" but liberty, and great security, not only to
" the subjects, but also to the king himself;
" and further no small lightening or easement
" to his charge. And that this may appear
" more evident unto you, ponder and weigh
" the experience of both regiments; and be-
" gin with the king of France, perusing after
" what sort he ruleth his subjects, by *regal go-*
" *vernment alone*: and then come to the effect
" of the joint governance, *regal* and *political*,
" examining by experience how and in what
" manner the king of England governeth his

"subjects*." After these observations, the author, in two separate chapters, contrasts the

* "Nonne vides jam, princeps clarissime, leges Angliæ "tanto magis clarescere, quanto eisdem tu amplius reluc- "taris? *Princeps*, video, inquit, et eas inter totius orbis "jura (in casu quo tu jam sudasti) præfulgere considero; "tamen progenitorum meorum Angliæ regnum quosdam "audivimus, in legibus suis minime delectatos, satagentes "proinde leges civiles ad Angliæ regimen inducere, et "patrias leges repudiare conatos: horum revera consilium "vehementur admiror. *Cancellarius!* Non admirareris, "Princeps, si causam hujus conaminis mente solicita per- "tractares. Audisti namque superius quomodo inter leges "civiles præcipua sententia est, maxima sive regula illa "quæ sic canit, *quod principi placuit legis habet vigorem*: "qualiter non sanciunt leges Angliæ, dum nedum *regaliter*, "sed et *politice* rex ejusdem dominatur in populum suum, "quo ipse in *coronatione* sua ad legis suæ observantiam "astringitur sacramento: quod reges Angliæ ægre ferentes, "putantes proinde se non libere dominari in subditos, ut "facient reges *regaliter* tantum principantes, qui lege civili, "et potissime predicta legis illius maxima, regulant plebem "suam, quo ipsi, ad eorum libitum, jura mutant, nova "condunt, pœnas infligunt, et onera imponunt subditis "suis, propriis quoque arbitriis, contendentium, cum ve- "lint dirimunt lites. Quare moliti sunt ipsi progenitores "tui hoc jugum *politicum* abjicere, ut consimiliter et ipsi "in subjectum populum *regaliter* tantum dominari, sed "potuis debacchari queant: non attendentes quod æqualis "est utriusque regis potentia; ut in predicto tractatu *de* "*nautra legis naturæ* docetur; et quod non jugum sed li-

misery produced by the absolute government in France with the happiness resulting from the limited monarchy in England. The whole treatise is well worth an attentive perusal; as it contains the judgment of a celebrated lawyer, concerning the mixed form of the English constitution, at a period when some have conceived it to be no less arbitrary and despotical than that which was established in France or in any other kingdom of Europe.

It will occur to the reader, that the opinion of Sir John Fortescue, in the passages above quoted, is widely different from that of Mr. Hume, who maintains that the legislative power of the English parliament was a mere *fallacy*.

The other English writer, from whose authority it appears that the government of Eng-

" bertas est *politice* regere populum, securitas quoque maxima nedum plebi, sed et ipsi regi, allevatio etiam non minima solicitudinis suæ. Quæ ut tibi apertius pateant, utriusque regiminis experientiam percunctare, et a régimine *tantum regali*, qualiter rex Franciæ principatur in subditos suos, exordium sumito: deinde a *regalis* et *politici* regiminis effectu, qualiter rex Angliæ dominatur in sibi subditos populos, experientiam quære." Vide cap. 32, 33, 34.

land was, at this time, understood to be a limited monarchy, is Sir Thomas Smith, a distinguished lawyer, and principal secretary both to Edward the sixth and to Elizabeth. In his *Commonwealth of England;* a work which unites liberality of sentiment with some philosophy; this author, after explaining the origin and progress of government, has occasion to consider more particularly the nature of the English constitution. "The most high and "absolute power," says he, "of the realm of "England, consisteth in the parliament.—The "parliament abrogateth old laws, maketh new; "giveth order for things past, and for things "hereafter to be followed, changeth rights "and possessions of private men, legitimateth "bastards, establisheth forms of religion, al"tereth weights and measures, giveth form "of succession to the crown, defineth of "doubtful rights, whereof no law is already "made, appointeth subsidies, tailles, taxes, "and impositions, giveth most free pardons "and absolutions, restoreth in blood and "name, as the highest court, condemneth "or absolveth them whom the prince will

" put to that trial. And, to be short, all " that ever the people of Rome might do, " either in *centuriatis*, *comitiis*, or *tributis*, the " same may be done by the parliament of " England, which representeth, and hath the " power of the whole realm, both the head " and the body. For every Englishman is " intended to be there present, either in per- " son or by procuration and attorney, of what " pre-eminence, state, dignity, or quality so- " ever he be, from the prince to the lowest " person of England. And the consent of " the parliament is taken to be every man's " consent*."—Among the privileges of par- liament, mentioned by this well-informed wri- ter, one is, that the members " may frankly " and freely say their minds, in disputing of " such matters as may come in question, and " that without offence to his majesty† "— He also enumerates the several branches of the prerogative; such as that of making peace and war, of coining money, of appointing the higher officers and magistrates of the realm,

* Commonwealth of England, b. ii. ch. 2.

† Ibid. ch. 3.

of drawing the tenths and first fruits of ecclesiastical benefices, of issuing writs and executions, of levying the wardship, and first marriage, of all those who hold of the king in chief. What he says concerning the *dispensing power* of the sovereign deserves particular notice, as he mentions the foundation of that power, and the limitations under which it was understood to be exercised.

"The prince," he observes, "useth also to "dispense with laws made, whereas equity "requireth a moderation to be had, and with "pains for transgressing of laws, where the "pain of the law is applied only to the prince. "But where the forfeit, (as in popular actions "chanceth many times) is part to the prince, "the other part to the declarator, detector, or "informer, there the prince doth dispense for "his own part only. Where the criminal is "intended by inquisition (that manner is "called with us at the prince's suit) the prince "giveth absolution, or pardon, yet with a "clause *modo stetrectus in curia*, that is to say, "that no man object against the offender. "Whereby, notwithstanding that he hath the

"prince's pardon, if the person offended will "take upon him the accusation (which in our "language is called the appeal) in cases where "it lieth, the prince's pardon doth not serve "the offender*." With what reason, therefore, or plausibility, can it be asserted, that no lawyer, in the reign of Elizabeth, conceived the English constitution to be a limited monarchy?

In perusing these accounts of the English government, we cannot fail to remark, that they are so little enforced by argument, and delivered with such plainness and simplicity, as makes it probable that they contained the doctrines universally received in that age, and which had never been the subject of any doubt or controversy.

The views of this important question, which have been suggested by other writers, it is not my intention to examine. But the opinions of this eminent historian are entitled to so much regard, and appear, in this case, to have so little foundation, that I could not help thinking it improper to pass them over in

* Commonwealth of England, b. ii. ch. 4.

silence. The improvements made in the English government, from the accession of the house of Stewart to the present time, with the present state of the British constitution in all its principal branches, are intended for the subject of a future enquiry.

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